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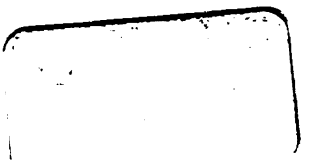

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IN THE

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OF

WASHINGTON

NOVEMBER 4, 1912 — JANUARY 25, 1913

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JUDGES

OF THE

SUPREME COURT OF WASHINGTON

DURING THE PERIOD COVERED IN THIS VOLUME

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*Succeeded Judge Mount, as Chief Justice, January 18, 1918.
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*For judges prior to January 18, 1918, see 70 Wash. p. IV.

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RULES OF THE SUPREME COURT.

ADOPTED JUNE 8, 1913.

RULE I.

COURT RECORDS AND BOOKS.

The Clerk of the Supreme Court shall keep the following books and records:

1. Journal.
2. Record of opinions.
3. Appearance docket.
4. Motion docket.
5. Fee book.
6. General index of cases.
7. In addition to the foregoing, the said clerk shall keep books in which shall be stated proper accounts of all moneys received and disbursed.

RULE II.

DOCKET FEES.

The Clerk of the Supreme Court will not file any transcript until the appellant shall have deposited with him the statutory docket fee, and he will not file any paper in any original motion, application or proceeding until the moving party shall have deposited such fee.

RULE III.

TRANSCRIPT AND STATEMENT OF FACTS.

1. Every transcript shall be plainly typewritten, with a black record ribbon, or printed, on paper of good quality of the size of legal cap, and be free from interlineations and erasures, and be duly paged and prefixed with an alphabetical index to its contents, specifying the page of each separate paper, order or proceeding, and have at least one blank fly leaf. Every statement of facts and bill of exceptions must also be printed or typewritten, and indexed in the same man-

ner, and when typewritten none other than a black ribbon copy shall be used.

2. Every transcript consisting of more than fifty leaves shall be bound under the direction of the Clerk of the Supreme Court.

RULE IV.

TRANSCRIPTS—OMISSIONS.

If any paper or part of the record directed to be sent up has been omitted from the transcript in any case, such omission may be supplied at any time before the cause is assigned for hearing by any party, without leave, by filing a properly certified transcript of such paper or part of the record with the Clerk of the Supreme Court, and at the same time giving the opposite party notice thereof. After a cause has been assigned for hearing, a paper or part of the record can be supplied only by leave of court.

RULE V.

TRANSCRIPTS—HOW CERTIFIED.

1. Transcripts must be certified by the Clerk of the Superior Court in substantially the following form:

STATE OF WASHINGTON, ...COUNTY, ss.

I, ..., Clerk of the ..... Superior Court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellant to transmit to the Supreme Court.

In testimony whereof, I have hereunto set my hand and the seal of said Superior Court this .....day of....., 19...

[SEAL] ....., Clerk.

By ....., Deputy.

2. Supplemental records shall be certified by the Clerk of the Superior Court substantially in the same manner.

RULE VI.

ABSTRACTS.

In every case in which an appeal shall be taken after June 12, 1913, thirteen copies of a legible tpyewritten abstract of

the record shall be filed with the Clerk of the Supreme Court along with the briefs of the party preparing the same. The typewritten abstract shall be in the same form as the transcript in the cause, shall be indexed, and shall contain appropriate references by pages to the transcript or statement of facts. Printed abstracts, bound separately from the printed briefs, but of the same size, type and form as the printed briefs, will be given the same effect by the court as typewritten abstracts. The abstract shall be substantially in the following form:

(The form outline suggested covers only a trial by jury in a civil action. In causes tried by the court, in criminal causes, and all special proceedings, the same general outline should be followed. In all cases, follow the events of the trial in their chronological order. Do not omit the appropriate captions or headings. Use the abbreviations Tr. for transcript, St. for statement of facts, p. for page. Append to the abstract in all instances appropriate references to the transcript or statement of facts, showing the page on which the paper abstracted will be found. Do not in any instance abstract more of the proceeding than is necessary to show the error involved. The cardinal rule to be observed is, present everything necessary to an understanding of the questions raised on the appeal in a brief and concise manner, and omit everything else.)

(On the cover.)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

JOHN DOE,
Appellant (Or Respondent),
v.
RICHARD ROE,
Respondent (Or Appellant).

APPELLANT'S ABSTRACT OF RECORD.

Appeal from the judgment of the superior court of .....County. Hon.....Judge.

A. B. & C. D.
Attorneys for Appellant.
(Address)

E. F. & G. H.
Attorneys for Respondent.
(Address)

(On the second page.)

INDEX.

(Here insert a complete index to each separate matter contained in the abstract, showing the page of the abstract on which it is found.)

(On the third and succeeding pages.)

COMPLAINT.

On the.....day of ....., 19..., the plaintiff served upon the defendant a complaint stating his cause of action as follows:

(Set out all of the complaint necessary to show the nature of the action and to an understanding of the questions presented on the appeal, and no more. Omit all formal parts, unless error is based thereon. In setting out exhibits attached to the complaint, omit all formal or irrelevant parts. Usually a general description of the exhibit will be sufficient.)

SUMMONS.

The summons and the return thereon are as follows:

(Insert so much of summons and return as may be necessary to show the error based thereon. If no error is claimed with reference to either the summons or return, omit entirely any reference thereto.)

MOTIONS.

On the.....day of ....., 19..., the defendant appeared (generally or specially) in the action and moved (to quash the service, or to make the complaint more definite and certain, etc.) basing his motion on the following grounds.

(Here state the grounds of the motion.)

Thereafter, and on the.....day of....., 19..., the same was submitted to the court and the following ruling was made thereon:

(Set out the ruling of the court, giving only the substance unless the entire entry is necessary to show the error claimed. If no error is predicated on the motion, omit all reference thereto.)

DEMURRER.

On the.....day of....., 19..., the defendant demurred to the complaint on the following grounds:

(Set out only the ground of demurrer on which the error is predicated.)

On the.....day of....., 19..., the same was submitted to the court and the following ruling made thereon:

(Set out the substance of the journal entry containing the ruling. Omit all formal parts unless necessary to show the error claimed. If no error is based on the ruling on the demurrer, omit any reference thereto.)

ANSWER.

On the .....day of....., 19..., the defendant answered the complaint as follows:

(Set out so much of the answer as may be necessary to make clear the issues and present the questions raised on the appeal. If affirmative defenses are pleaded, set out only the substance of them, unless a literal copy is necessary to show the error claimed. If motions or demurrers were made to the answer, and error is predicated on the rulings made thereon, set out the same under the caption, "MOTION TO ANSWER," "DEMURRER TO ANSWER," as the case may be, following the form suggested for motions and demurrers directed against the complaint.)

REPLY.

On the.....day of....., 19..., the plaintiffs replied to the answer as follows:

(Here set out the substance of the reply. If motions or demurrers were directed against the reply, and error is based on the rulings thereon, set out the same under the caption, "Motion to Reply," "Demurrer to Reply," as the case may be, following the form suggested for motions and demurrers directed against the complaint.)

TRIAL—EXAMINATION OF THE JURY.

On the.....day of ....., 19..., the cause was tried by a jury wherein the following proceedings were had:

JOHN STYLES being called as a juror and duly sworn to make true answers touching his qualifications to sit as a juror, answered the interrogatories propounded to him as follows:

(Set out his answers in narrative form, unless the questions propounded are necessary to an understanding of the objections made to his qualifications. If no question is made on the appeal as to the qualification of any juror, omit all reference to the method by which the jury was impaneled; state simply that a jury was impaneled and sworn.)

STATEMENT OF COUNSEL.

After which A. B., of the attorneys for the plaintiff, made the following statement to the jury:

(Set out the statement if necessary to an understanding of any question raised on the appeal. If not, omit all reference to the statement. Proceed in the same manner through all of the preliminary proceedings had prior to the commencement of the introduction of testimony, in so far as the same is necessary to an understanding of some question raised on the appeal.)

EVIDENCE.

TITUS OATES was called and sworn as a witness on behalf of the plaintiff and in answer to interrogatories propounded to him by A. B., of the attorneys for the plaintiff, testified as follows:

(Set out his direct testimony in narrative, unless the question and answer is necessary to an understanding of the error claimed. If the witness identifies an exhibit, and the exhibit is introduced in evidence, insert a description of the same.)

On CROSS-EXAMINATION by C. D., of the attorneys for the defendant, he further testified as follows:

(Set out his cross-examination, following the form suggested for his direct testimony.)

On RE-DIRECT EXAMINATION, he further testified as follows:

(Set out the same. Continue in the same manner with respect to each witness sworn on behalf of the plaintiff. In all cases abstract only so much of the evidence as may be necessary to show the error involved; it is necessary to abstract the evidence in full only in those cases where the entire evidence is required to show the error.)

MOTION FOR A NONSUIT.

At the conclusion of the testimony of the witness Titus Oates, the plaintiff rested, whereupon the defendant moved for (a nonsuit, or a directed verdict, challenged the legal sufficiency of the evidence, as the case may be) on the grounds that (state the grounds of the motion). The court overruled (or sustained) the motion, stating the reason for the ruling as follows:

(Set out the reasons given.)

DEFENDANT'S EVIDENCE.

MILTON GILES was called and sworn as a witness on behalf of the defendant, and in answer to interrogatories propounded to him by E. F., of the attorneys for the defendant, testified as follows:

(Set out his testimony in the manner given for abstracting the evidence of the plaintiff's witnesses.)

REBUTTAL EVIDENCE (PLAINTIFF'S)

At the conclusion of the testimony of the witness Milton Giles, the defendant rested, whereupon the plaintiff introduced the following testimony in rebuttal:

(Abstract the evidence in the manner given for abstracting evidence of the plaintiff's witnesses in chief. If the defendant offers evidence in rebuttal of that offered by the plaintiff, set the same forth with the caption, "REBUTTAL EVIDENCE (Defendant's).")

REQUESTED INSTRUCTIONS.

At the conclusion of the evidence the (plaintiff or defendant, as the case may be) requested the court to give to the jury the following instructions, namely:

(Set forth the instructions requested and refused on which the claim of error is predicated. Show in the appropriate place the exceptions taken to the refusal to give each requested instruction.)

INSTRUCTIONS GIVEN BY THE COURT.

The court instructed the jury (orally or in writing, as the case may be) as follows:

(Set out the substance of each instruction given, and the instructions in full to which exceptions are taken and on which error is predicated. Show in the appropriate place the exceptions taken to the instructions.)

ARGUMENT.

The cause was argued to the jury by the respective attorneys for the plaintiff and defendant, during which A. B., of the attorneys for the plaintiff, used the following language:

(Set out the argument to which objection is made.)

To the argument of the attorney the defendant's counsel objected for the reason (set out the reason). The court ruled thereon as follows: (Set out the ruling).

(If no error is predicated on the argument of counsel, omit any reference to the argument.)

VERDICT.

The jury retired to consider of their verdict, and thereafter on the.....day of ....., 19..., returned the same into court as follows:

(Set out the body of the verdict, omitting all formal parts.)

JUDGMENT.

Upon the return of the verdict the clerk entered a judgment thereon as follows:

(Set out sufficient of the entry to show the nature of the judgment entered. If error is predicated thereon, set forth all that is necessary to show the error. Omit all formal parts.)

MOTION FOR A NEW TRIAL.

On the.....day of....., 19..., plaintiff moved (for a new trial, in arrest of judgment, for a judgment *non obstante veredicto*, as the case may be) basing his motion upon the following grounds: (Set out the substance of the motion.) The motion was submitted to the court on the .....day of....., 19.... The court (granted or denied) the same on the.....day of....., 19..., on the following grounds:

(If the motion is granted and a claim of error is made thereon on the appeal, set out sufficient of the entry to show the claim of error. In cases tried by jury in which the clerk does not enter judgment on the return of the verdict, recite in chronological order the proceedings leading up to and including final judgment. The nature of the judgment should be shown in every instance, but set forth the matters succeeding the verdict and preceding the judgment only when some claim of error is based thereon.)

APPEAL.

On the.....day of....., 19..., the (plaintiff or defendant) appealed from the judgment by (giving notice in open court, or by serving a written notice) and on the .....day of....., 19..., filed his bond on appeal, conditioned (as a cost bond or supersedeas bond, as the case may be) with the following named persons as sureties: (Set out the names of the sureties). The transcript on appeal was prepared and filed in the office of the clerk of the superior court on the.....day of....., 19...; the statement

of facts was filed on the.....day of ....., 19..., and served on the.....day of....., 19...; amendments to the statement of facts were proposed by the respondent on the.....day of....., 19...; and the statement was settled and certified by the trial judge on the .....day of....., 19....

RULE VII.

SUPPLEMENTAL ABSTRACTS.

1. If the respondent is not satisfied with the appellant's abstract, he may cause to be typewritten, or printed, a supplemental abstract of the matter omitted which he deems essential to an understanding of the questions presented on the appeal. The supplemental abstract shall follow the form of the original abstract, shall refer to the page of the original abstract where the omitted matter is to be inserted, and shall contain appropriate references to the transcript, bill of exceptions, or statement of facts; *Provided, however*, That if, in the opinion of the Supreme Court upon the consideration of the case, the respondent's supplemental abstract was necessary to the consideration of the questions presented, and was made thus necessary by reason of the fact that the appellant's abstract did not fairly state the record or the evidence, the costs of such supplemental abstract shall be charged to the appellant regardless of the termination of the case.

2. The appellant may supplement his original abstract without leave of court at any time before the cause is assigned for argument. The supplemental abstract shall follow the form of the original abstract, shall contain appropriate references to the pages of the transcript or statement of facts where the matter abstracted can be found, and shall show at what pages of the original abstract the new matter is to be inserted. The supplemental abstract shall be served on the adverse party. After a cause has been assigned for hearing, supplemental abstracts may be filed therein only by leave of the Chief Justice.

RULE VIII.

CONTENTS AND STYLE OF BRIEFS.

1. Briefs shall be printed throughout in plain, clear type, not smaller in size than pica, on unglazed white paper, and shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages of the abstract for verification.

2. Each error relied on shall be clearly pointed out and separately discussed under appropriate designated headings: *Provided*, That several assignments presenting the same general questions may be discussed together.

3. In citing authorities, the titles of cases and the names and numbers of volumes must be clearly set out in each place in the brief where the case is mentioned; and in citing text books the number of the edition must be specified.

4. Briefs must be of the following dimensions, to wit: 8½ inches from top to bottom; 6½ inches from edge to edge, inclusive of the margin, which must be 1½ inches at the top, bottom and outer edge of each printed page. The cover shall be gray in color, or some color that will readily show the print. The title of the case, the designation, Brief of Appellant, Brief of Respondent, Appellant's Reply Brief, as the case may be, and the names of the attorneys appearing on the side upon which the brief is filed, with their respective addresses, shall be printed on the front cover.

5. Twenty-five copies of all printed briefs shall be filed with the clerk.

6. In case either party, after filing briefs, desires to submit additional authorities, the same shall be submitted not less than one day prior to the hearing of the appeal. Said authorities so submitted shall be typewritten or printed, and twelve copies thereof shall be filed with the Clerk of the Supreme Court, and not less than one copy served upon the adverse party.

RULE IX.

ASSIGNMENT OF CAUSES.

1. For the purpose of hearings in the Supreme Court, causes from the several counties will be assigned as follows:

1. Thurston. 2. Mason. 3. Lewis. 4. Chehalis. 5. Pierce. 6. King. 7. Kitsap. 8. Pacific. 9. Wahkiakum. 10. Cowlitz. 11. Clarke. 12. Skamania. 13. Snohomish. 14. Skagit. 15. Whatcom. 16. Island. 17. San Juan. 18. Jefferson. 19. Clallam. 20. Kittitas. 21. Yakima. 22. Benton. 23. Klickitat. 24. Chelan. 25. Okanogan. 26. Douglas. 27. Grant. 28. Adams. 29. Lincoln. 30. Franklin. 31. Walla Walla. 32. Columbia. 33. Asotin. 34. Garfield. 35. Whitman. 36. Spokane. 37. Stevens. 38. Ferry.

2. Exceptions to this order may be made when public interests so require.

3. Ten days before the beginning of each session of the court the clerk shall assign for hearing in the order named in subdivision 1 of this rule any cause on the docket ready for hearing to that department of the court to which it has been apportioned by the Chief Justice. A cause on the docket of the court shall be deemed ready for hearing when it appears that the transcript is on file; and—

(a) That the appellant's opening brief, the respondent's brief, and the appellant's reply brief are on file;

(b) That the appellant's brief and respondent's brief are on file;

(c) That the appellant's brief is on file, and has been served upon the respondent for a period of thirty days or more;

(d) That the appellant's brief is on file, and all parties to the appeal have stipulated that the cause may be assigned for hearing at such session.

4. Reply briefs in any case must be filed with the clerk of the Supreme Court not later than Thursday of the week preceding the date the case is assigned for hearing. Costs for

briefs filed later than such date will not be allowed by the clerk.

5. Cases ready for hearing may be submitted on briefs by stipulation, at any time.

RULE X.

CALENDAR.

As soon as the cases shall have been assigned for a regular session of the court, the clerk shall print a calendar thereof, indicating at the head of each page of such calendar the department of the court to which the case has been apportioned, and shall mail a copy of the calendar to each attorney or firm having any cause thereon.

RULE XI.

ARGUMENTS.

No more than two counsel on a side will be heard upon the argument of any question, unless the court shall direct otherwise: *Provided*, That each party who has appeared separately and by different counsel in the Superior Court shall, if he so desire, be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument upon the merits in all cases. In argument of motions and all preliminary or collateral matters, the counsel for the party having the affirmative of the issue shall open and close. Arguments upon the merits shall be limited to one-half hour upon a side, and all other arguments to one-quarter of an hour upon a side, unless an extension of time be obtained from the court before the argument is commenced.

RULE XII.

ERRORS CONSIDERED.

No alleged error of the Superior Court will be considered by the Supreme Court unless the same be clearly pointed out in the appellant's brief: *Provided*, That the objection that this court has no jurisdiction of the appeal may be taken at any time.

RULE XIII.

REHEARINGS AND HEARINGS EN BANC.

1. Every petition for rehearing or hearing *en banc* must be filed within thirty days after the opinion shall have been rendered, and no more than one petition for a rehearing or hearing *en banc* shall be filed: *Provided*, That the court may, in its discretion, allow any petition to be amended. The filing of a petition for rehearing or hearing *en banc* shall suspend the decision of the court until a ruling thereon.

2. One typewritten copy of the petition for rehearing or hearing *en banc*, filed with the clerk, shall be sufficient.

3. When a decision is rendered upon a petition for rehearing or hearing *en banc*, the clerk shall promptly notify counsel for the respective parties.

RULE XIV.

COST BILLS.

1. The prevailing party shall, within ten days after the filing of the opinion in a case, file with the clerk a cost bill, and serve upon the adverse party a copy thereof. If any adverse party objects to any item or items thereof, he shall serve upon the prevailing party exceptions to such cost bill, together with affidavits in support of his exceptions, if desired, and file the original, with proof of service, with the clerk of the court within ten days after service of the cost bill upon him. Whereupon the clerk shall tax the costs to which the prevailing party is entitled, and shall notify the parties of such taxation. Either party may except to the taxing of any item or items, or failure to tax the same, and shall serve such exceptions on the adverse party and file the same with the clerk within ten days after such taxation. Said exceptions shall be heard by the court on the first motion day after the expiration of five days from the date of service of such exceptions. If the party fail to appear at such time, the court will consider such exceptions upon the affidavits on file and the records in the cause, and determine the same.

2. If no cost bill is filed and served, the clerk will tax as costs only the clerk's costs, printing of briefs at seventy-five cents per page, the statutory attorney fee, and the cost of transcript, statement of facts and abstracts at the rate of five cents a folio.

3. Where a cost bill has been served and filed in time, and no exceptions are filed, objection thereto will be deemed to have been waived.

RULE XV.

SUBMISSION ON FAILURE TO APPEAR.

Where a party does not appear when the cause is called for hearing, and the appeal has been perfected, and the brief of such party shall be on file, the cause, as regards such party, shall be deemed submitted. This rule shall not preclude oral argument by the opposite party.

RULE XVI.

RESPONDENT FILING NO BRIEF.

Where the respondent fails to file a brief in the cause, the court will take the submission of the same by the appellant, and decide upon the merits of the appeal, if it shall appear to have acquired jurisdiction of the cause.

RULE XVII.

TAKING PAPERS FROM CLERK'S OFFICE.

No paper filed with the Clerk of the Supreme Court shall be taken from the court room or clerk's office except by permission of the court or one of the judges, and when so taken a receipt in writing therefor must be left with the clerk. Permission to take papers will not be granted except to a party, or his attorney, who shall have entered an appearance in the Supreme Court in the cause in which such paper is filed.

RULE XVIII.

MOTIONS—HOW MADE AND HEARD.

1. Motions to strike out any portion of the transcript, the statement of facts, or to dismiss or affirm upon the record, and all technical motions tending to prevent the hearing of a cause upon its merits, may be made in writing and noticed for some Friday of the session, or the last Friday of any month of the year excepting the months of July and August, or the same may be made and plainly stated in the respondent's brief and heard at the time the cause is assigned upon the calendar.

2. All other motions in appealed causes must be made in writing, and noticed for some Friday of the session or for the last Friday of any month excepting the months of July and August at the opening of court on that day. The motions referred to in this and the first clause of the preceding paragraph will be known as *noticed motions*.

3. At least two days before the day set for the hearing of such a motion, the motion and notice, with proof of service thereof, must be filed with the clerk. The clerk will prepare a calendar of noticed motions for each Friday, in the order of their filing, and they will be given precedence of other hearings on that day.

4. The Fridays of the weeks during the regular hearing of cases and the last Friday in each month excepting the months of July and August, are hereby designated as motion days.

5. The moving party shall file with the clerk at or before the hearing of any motion twelve copies of a printed or typewritten list of the authorities relied upon to sustain the motion, and the opposing party shall at or before the hearing file a like number of copies of a printed or typewritten list of authorities relied upon to oppose the motion.

RULE XIX.

NOTICES OF MOTIONS.

1. All notices of motions not given in the briefs must be in writing; and the necessary time of notice shall be not less than ten days, unless a different time is fixed by statute or the special order of this court. But where the service of a notice is made by mail between different places, the time of notice above mentioned shall be thirteen days.

2. Service of papers must in all cases be made upon the attorney of record of a party, if he have one, unless the place of business or residence of such attorney is unknown, when it may be made upon the party.

RULE XX.

SERVICE OF PAPERS.

Service of papers may be made as follows:

First. If upon an attorney, by delivering to him personally, or at his office by delivery to his clerk or to the person having charge thereof; or if his office be not open, or there be no one in charge thereof, at his residence by delivery to some person of suitable age and discretion; or, if neither of the foregoing methods can be followed, by deposit in the post-office to his address, with postage prepaid: *Provided*, That in capital cases a motion to dismiss an appeal shall be served upon the defendant personally, as well as upon the attorney of record.

Second. If upon a party, by delivery to him personally, or at his residence, by delivery to some person of suitable age and discretion, between the hours of 9 o'clock in the forenoon and 9 o'clock in the evening.

RULE XXI.

SERVICE—RESIDENCE UNKNOWN.

Where the residence of a party and of his attorney of record, if he have one, is not known, the service may be made upon the Clerk of the Superior Court in which the cause was tried, for the party or attorney.

RULE XXII.

SERVICE BY MAIL.

1. Service may be made by mail when the person making the service and the person on whom such service is to be made reside in different places, between which there is regular communication by mail; postage must in such cases be prepaid.

2. Time shall begin to run from the date of deposit in the postoffice.

RULE XXIII.

HABEAS CORPUS.

1. A Judge of the Supreme Court, when applied to for writs of *habeas corpus*, may make the same, if granted, returnable before himself or before the Supreme Court, or before any Superior Court of the state, or any judge thereof.

2. Upon such an application, however, the judge applied to may make an order to show cause why the writ should not issue returnable before the Supreme Court.

3. Unless there be special reasons to the contrary, writs of *habeas corpus* will be issued by the Supreme Court only after a hearing upon an order to show cause.

4. In all cases where the person whose release is sought to be obtained by original *habeas corpus* from this court is imprisoned in the penitentiary, or in a county jail, upon a charge or conviction of felony, service of the order to show cause and petition must be made upon the superintendent or sheriff, as the case may be, the prosecuting attorney of the county from whence the prisoner was committed, or in which he is confined, and the Attorney General at his office in Olympia.

5. Where the imprisonment is in a county jail upon a charge or conviction of misdemeanor, the service must be upon the prosecuting attorney and sheriff of that county.

RULE XXIV.

OTHER ORIGINAL WRITS.

1. In all other cases of applications to the Supreme Court for original writs, under either its original or its appellate jurisdiction, the applicant shall show that he has given notice to the opposite party or his attorney of record of his intention to apply for such writ and the time thereof, or furnish satisfactory reasons by affidavit for his failure to give such notice.

2. The notice above required shall not be less than four nor more than fourteen days. Applications under this rule must be made on a regular motion day, unless there be some special emergency requiring earlier action.

3. The opposing party shall be at liberty to make any objections he sees fit upon the face of the papers presented with the application.

4. Upon the final hearing of any application under this rule, each side shall furnish for the use of the court, twelve written or printed copies of their points and authorities.

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 10760. Department Two. November 4, 1912.]

THE STATE OF WASHINGTON, *on the Relation of E. H. Ferguson et al., Plaintiff*, v. THOMAS E. GRADY, *as Judge etc., Defendant.*[1]

APPEAL—SUPERSEDEAS—INJUNCTION. Rem. & Bal. Code, § 1723, providing for a supersedeas on appeal from a final judgment in a cause wherein a "temporary injunction has been granted," does not authorize a supersedeas, where a temporary restraining order was issued without notice until a hearing could be had, and upon an order to show cause why a temporary injunction should not issue, the parties appeared and agreed to an early trial on the merits, and a continuance was had upon the application for the injunction *pendente lite*, leaving the restraining order in *statu quo*, and after trial, final judgment was entered dismissing the case, and no injunction was issued and no agreement made that the restraining order should stand as a temporary injunction.

MANDAMUS—PROCEEDINGS—BURDEN OF PROOF. Upon application to the supreme court for a writ of mandamus, the applicant has the burden of proof, if the facts are denied, and must fail where he stands upon allegations put in issue without asking for a reference to determine the facts.

Application filed in the supreme court September 30, 1912, for a writ of mandamus to compel the superior court for Yakima county, Grady, J., to fix the amount of a supersedeas bond. Denied.

Bonsted & Kemp, for relators.

Englehart & Rigg, for defendant.

[1]Reported in 127 Pac. 305.

FULLERTON, J.—This is an original application for a writ of mandamus commanding the respondent to fix a supersedeas bond, for the purpose of continuing in force pending an appeal a restraining order, issued without notice, which it is claimed became by agreement a temporary injunction. The record as made in this court shows the following: On August 21, 1912, the relators, as plaintiffs, began an action in the superior court of Yakima county against the city of Toppenish, the mayor, councilmen and clerk of the city and the Barber Asphalt Paving Company, as defendants, seeking to enjoin the defendants city of Toppenish and the persons named as officers thereof from entering into a contract with the defendant Barber Asphalt Paving Company for paving certain streets of the defendant city. On the filing of the complaint, a temporary restraining order was issued without notice to the defendants, restraining the defendants from entering into such contract before a day certain named therein, and requiring them to appear on the day named and show cause, if any they had, why a temporary injunction should not be issued enjoining the execution of the contract pending the final determination of the cause. The restraining order and order to show cause was duly served on all of the defendants except the defendant the Barber Asphalt Paving Company. Prior to the time fixed for the hearing, the defendants appeared and answered the complaint on the merits, and a reply to the answer was duly served and filed, in which an additional cause of action to the cause of action stated in the complaint was set forth.

The relators in their application for the writ of mandamus recite the subsequent proceedings in the following language:

"That on the said 24th day of August, 1912, at the hour appointed in the said order to show cause, plaintiffs, by their attorneys Bonsted & Kemp, and G. G. Lee, and the defendants, by their attorneys, Englehart & Rigg, Peters & Powell and W. H. Shea, Jr., appeared before the Honorable Thomas E. Grady, judge of said superior court, defendant herein, whereupon the following proceedings were had.

Plaintiffs moved that the new matter set up in their reply be treated as an amendment to their said complaint, to which motion counsel for defendants consented, and motion was allowed by the court. Thereupon Mr. Englehart, of counsel for defendants, briefly reviewed the allegations of the complaint, and suggested to the court that the hearing upon the order to show cause would necessarily involve trying all the issues in the case, and that if satisfactory to the court and to counsel for plaintiffs, that the court fix a date for trial at which time the whole case would be heard on its merits, and that in the meantime the restraining order theretofore issued, remain in full force and effect, pending the final determination of the action, to all of which counsel for plaintiffs consented and the court accordingly fixed as the date of trial the 4th day of September, 1912.

"That said cause came on for trial on the said 4th day of September, and the whole cause was tried on its merits, the trial continuing for three (3) full days; that thereafter and on the 19th day of September, 1912, the court rendered its decision, and ordered judgment in favor of defendants and dismissing plaintiffs' complaint, and adjudged and decreed that any and all restraining orders theretofore issued, in said action, be of no further force or effect, whereupon deponent, as one of counsel for plaintiffs, duly excepted to the judgment of the court, and gave notice in open court before the judge thereof, the defendant above named, that plaintiffs appeal from said judgment to the supreme court of the state of Washington, that thereupon the court directed the clerk of said court to make entry of such notice of appeal in the journal of the court; that immediately thereafter deponent, as one of counsel for plaintiffs, moved the court to fixe the penalty of the bond to be filed by plaintiffs for the purpose of continuing in force, during the pendency of such appeal, the temporary injunction theretofore granted in said cause; that the court continued the hearing of said motion until Monday, the 23rd day of September, 1912, at 1:30 p. m., at which time plaintiffs appeared before said court by deponent as their counsel, defendants appearing by Ira P. Englehart, of counsel, and after hearing argument of counsel the court refused to fix the amount of said supersedeas bond and ever since has and still refuses to fix the amount of such bond."

The answer of the trial judge, as set forth in his return to the application for the writ, recites the proceedings as follows:

"And I further allege and aver that all matters and things in said affidavit of D. H. Bonsted contained are true and correct, except that on the 24th day of August, 1912, instead of the proceedings being had at said time as set up and stated by said D. H. Bonsted in his said affidavit in said lines seven to twenty-three, inclusive, of page four thereof, being had, the following took place and occurred at said time.

"It was agreed in addition to the matters and things referred to in said affidavit of D. H. Bonsted, that the defendants' answer should stand as the answer to the plaintiffs' amended complaint in said action. Thereupon Mr. Englehart, of counsel for defendants, briefly reviewed the allegations of the pleadings, and suggested to the court that the hearing upon the order to show cause why a temporary injunction pending the final disposition of the case should or should not issue, would probably involve trying all the issues in the case at that hearing in advance of the final trial, and that the effect would be to have two full trials of the same issues; that the defendants were ready to go ahead and then and there try the question of whether a temporary injunction should issue in the case or not, pending the final hearing, but were willing that the whole question should be tried at a later date if the court and counsel for plaintiffs were willing. The counsel for plaintiffs and defendants, in open court before me, then agreed that no hearing should be had upon the show cause order already issued, that day; that the original restraining order entered without notice and then outstanding, should remain in *statu quo* and the hearing on said show cause order should be continued until September 4th, 1912, at ten o'clock a. m., when the question would be tried out as to whether any injunction of any kind or at all should issue in the case. No restraining order or injunction of any kind whatsoever, other than the one a copy of which is referred to in the relators' application herein, was ever made or entered in said action, and it was issued without notice to defendants or either of them. At the time appointed, to wit, September 4th, 1912, at ten o'clock a. m., the said action came on for trial before me, was tried, and thereafter and on the 19th day of September, 1912, I ren-

dered my decision as superior judge, and entered judgment in favor of the defendants, and decided that no injunction of any kind or at all should issue in favor of the plaintiffs or either of them, and against the defendants, or either of them, in said action. That I did not fix the amount of a supersedeas bond in said action, at the request of relators, because no temporary injunction had ever been issued in said action. That the hearing which was had in said action before me on the 4th day of September, 1912, was as to whether or not any temporary or permanent injunction should issue in said action, all of which I decided in the negative."

The statute relating to a supersedeas on an appeal from a final judgment in which a temporary injunction has been granted by the party applying for the injunction, reads as follows:

"In all cases where a final judgment shall be rendered by any superior court of this state in a cause wherein a temporary injunction has been granted, and the party at whose instance such injunction was granted shall appeal from such judgment, such injunction shall remain in force during the pendency of such appeal, if, within five days after service on him of notice of the entry of the final judgment, such appellant shall file with the clerk of the superior court a bond, with one or more sufficient sureties, in a penalty to be fixed by said court, conditioned that the appellant shall pay to the respondent all costs and damages that may be adjudged against the appellant on the appeal, and all costs and damages that may accrue to the respondent by reason of the injunction remaining in force." Rem. & Bal. Code, § 1723.

It is the appellants' contention that the restraining order, inasmuch as it was kept in force pending a further hearing of the cause after the day fixed for the hearing on the order to show cause why a temporary injunction should not issue, became in effect a temporary injunction, and entitled the relators as a matter of right to keep it in force pending an appeal taken by them from the final judgment entered in the cause. Whether this contention is sound or not must depend, it seems to us, upon which version of the proceedings as above recited this court shall deem to be correct. If it be true that

the defendants, after appearing in response to the order to show cause, consented that the restraining order should stand as a temporary injunction pending the final determination of the cause, it is clear that it became so in fact, and it can be kept in force pending an appeal from the final judgment as a matter of right in virtue of the section of the statute above quoted. But on the other hand, if it be true that the restraining order was continued in force until a more convenient season for trying the issues suggested by the order to show cause, and was not in fact kept in force as a temporary injunction, then it is equally clear that it does not remain in force pending an appeal, but lapses the moment the court refuses to grant an injunction. It has seemed to us that we must adopt the version of the proceedings set forth in the return to the writ as the correct version. The applicant for the writ has the burden of showing the facts necessary to authorize the issuance of the writ, and if the facts he sets forth in his application for its issuance are denied by the return, we must accept the return as true unless the applicant chooses to have the issues made tried under an order of reference. Here the applicant has asked for no such order, but has submitted the matter to our judgment on the pleadings as they stand. Accepting the return as true, no cause exists, as we say, for allowing the supersedeas.

The alternative writ heretofore issued will be quashed, and its application for the peremptory writ denied.

MOUNT, C. J., ELLIS, MAIN, and MORRIS, JJ., concur.

[No. 10671. Department Two. November 4, 1912.]

GEORGE A. BELL, *Appellant*, v. JOVITA HEIGHTS COMPANY, *Respondent*.[1]

PLEADING—DEMURRER—OBJECTIONS RAISED. On demurrer to the complaint for fraud in the sale to plaintiff of an undivided interest in certain land, it cannot be assumed that the undivided interests were uncertain or incapable of being made certain, where such fact was not pleaded.

VENDOR AND PURCHASER—RECOVERY OF MONEY PAID—FALSE REPRESENTATIONS—COMPLAINT—SUFFICIENCY. A complaint states a cause of action for the recovery of money procured by fraud, where it alleges that the defendant induced the plaintiff to purchase land, situated at a distance, in reliance upon false representations to the effect that the lots were on a level street, graded and with sidewalks, with adequate light and water facilities and electric railway service.

SAME—PLEADING—RELIANCE ON REPRESENTATIONS. A complaint for the recovery of money procured by fraudulent representations as to lots sold to the plaintiff sufficiently alleges that the representations were made prior to the execution of the contract, where it is alleged that the plaintiff relied upon the representations and made the contract.

VENDOR AND PURCHASER—RESCISSION BY PURCHASER—TENDER OF RECONVEYANCE—PLEADING—NECESSITY. In an action by a purchaser to recover money paid on sales induced by fraudulent representations, the complaint is not objectionable in that it fails to allege a tender to reconvey the land, where it does not appear from the complaint that the plaintiff ever received any deed.

ASSIGNMENTS—ACTION BY ASSIGNEE—NECESSARY PARTIES. In an action upon assigned claims for money procured by fraud and deceit, the assignors are not necessary parties plaintiff, as the right of action may be enforced by the assignee.

ASSIGNMENTS—CHOSE IN ACTION—ACTION FOR FRAUD. A cause of action for money procured by fraud and deceit in the sale of land, rescinded by the purchaser on discovery of the fraud, survives and is assignable.

ACTIONS—JOINDER OF CAUSES—ASSIGNED DEMANDS FOR FRAUD. Several rights of action against one defendant for money procured by fraud and deceit, assigned by various parties to one of their number, may all be joined and recovery had in one action under Rem.

[1]Reported in 127 Pac. 289.

& Bal. Code, § 296, authorizing a plaintiff to join as many causes of action as he may have if they arise out of contract, express or implied, or injuries to property.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 22, 1912, dismissing an action to recover money paid under fraudulent representations, upon sustaining a demurrer to the complaint. Reversed.

Colvin & Nause, for appellant.

Kerr & McCord and *Hammond & Hammond*, for respondent.

ELLIS, J.—The plaintiff prosecutes this appeal from a judgment dismissing his action upon a demurrer to his amended complaint. There are fifty-one causes of action separately stated in the amended complaint, the first of which alleges:

"(1) That at all times hereinafter mentioned, the defendant, Jovita Heights Company, was and still is a corporation organized and existing under and by virtue of the laws of the state of Washington.

"(2) That on or about the 20th day of May, 1910, the plaintiff and defendant, by an instrument in writing (which writing is now in the possession of said defendant and ever since has been) made and entered into an agreement, wherein and whereby the defendant agreed to sell and convey to the plaintiff, and the plaintiff was to buy and pay for, as hereinafter set out an undivided interest in a certain tract of land being a part of sections twenty-three (23), twenty-six (26), twenty-seven (27), and thirty-five (35) in township twenty-one (21) north, range four (4) east W. M., all located in King county, Washington. That the agreed price for such undivided interest in said tract of land was to be the sum of one hundred forty ($140) dollars, to be paid as follows, to wit: Ten ($10) dollars upon the making of said agreement, and a further sum of ten ($10) dollars every thirty days thereafter until the complete sum of $140 had been paid. That under said agreement this

plaintiff paid to said defendant the sum of one hundred ($100) dollars.

"(3) That said tract of land is platted into lots and blocks, which plat was made by said defendant; said lots ranging in size from one hundred twenty feet by forty feet (120 x 40) to five (5) acres. That said defendant falsely and fraudulently represented to this plaintiff that each of the lots in said tract of land faced and adjoined levelled or graded streets and that the streets in said tract of land would be lighted with electricity; that said defendant further falsely and fraudulently represented to this plaintiff that there were sidewalks on the streets and in front of the lots in said tract of land, and that sidewalks were being laid therein; and further falsely and fraudulently represented to this plaintiff that there was adequate light and water facilities, and that said property was very valuable for residence purposes and for suburban homes, and that the same was adequately served by an electric railway line running between the cities of Seattle and Tacoma, Washington, and that another electric interurban line between said cities that was partly built would serve said tract of land.

"(4) That this plaintiff resides in Pullman, Washington, which is several hundred miles from the tract of land referred to herein, and it was impossible for this plaintiff to personally examine said tract of land, and the conditions surrounding the same, to verify the representations of said defendant, and this plaintiff therefore relied absolutely upon the said false and fraudulent representations of said defendant, and made and entered into the agreement hereinbefore referred to, and paid to said defendant under said agreement the sum of one hundred dollars ($100).

"(5) That on or about the 20th day of June, 1911, this plaintiff learned for the first time of the false and fraudulent representations of said defendant, as hereinbefore set out; that he thereupon demanded of said defendant the return of said one hundred ($100) dollars, notifying said defendant that he refused to carry out said contract on the grounds of the false and fraudulent nature of the representations of said defendant.

"(6) That by reason of the facts hereinbefore stated this defendant is indebted to this plaintiff in the sum of one

hundred dollars ($100), and said defendant has failed, neglected and refused to pay the same or any part thereof."

The other causes of action are set forth in substantially the same terms, except that in each (save the second which is in the same terms as the first) the contract is alleged to have been made with a third party who, on his discovery of the fraud in June, 1911, refused to further carry out the agreement, and demanded a return of the money paid thereon, which in the different causes is alleged in sums varying from $60 to $140. In each of these it is alleged that the respective contract holder, prior to the commencement of the action, by a written instrument, a copy of which is attached to and made a part of the complaint, assigned and transferred to the plaintiff, for a valuable consideration, his claim of indebtedness by reason of the premises against the defendant. The defendant demurred to the amended complaint, upon the grounds: (1) That there is a defect of parties plaintiff; (2) that several causes of action are improperly joined; (3) that neither the amended complaint nor any of the fifty-one causes of action states facts sufficient to constitute a cause of action.

The appellant contends that each of the several separately alleged causes stated a cause of action, because the contracts therein set up were void for uncertainty in that the instrument did not show the extent of the undivided interest in the whole tract which each of the parties was to receive. It is urged that, while the agreement stood in that condition, the contract could not be specifically enforced, and the transaction could be repudiated by either party and the money paid thereon recovered. If the amended complaint had sufficiently stated these facts, there could be no question of the correctness of appellant's contention. *Scanlon v. Oliver*, 42 Minn. 538, 44 N. W. 1031; *Buckley v. Wood*, 67 N. J. L. 583, 52 Atl. 564; *Barton v. Spinning*, 8 Wash. 458, 36 Pac. 439. There was no allegation that the undivided interests were uncertain, or incapable of being made certain without resort to further negotiation or agreement. We cannot as-

sume the existence of facts not pleaded, in order to declare the contracts void.

The appellant's further contention, that the amended complaint stated a cause of action for the recovery of money procured by means of fraud and deceit, must be sustained. Each of the causes of action contained appropriate allegations to charge the defendant with liability for false and fraudulent representations as to the subject-matter of the contracts, upon the faith of which the various persons in whom the respective rights of action originally vested relied in taking the contracts and paying money thereon. That they had the right to rely upon these representations, under the circumstances pleaded, is well established by the decisions of this court. *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102; *Bailie v. Parker*, 56 Wash. 353, 105 Pac. 834; *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55; *West v. Carter*, 54 Wash. 236, 103 Pac. 21; *Jones v. Hawk*, 64 Wash. 171, 116 Pac. 642; *McMillen v. Hillman*, 66 Wash. 27, 118 Pac. 903; *Kuehl v. Scott*, 66 Wash. 318, 119 Pac. 742; *Godfrey v. Olson*, 68 Wash. 59, 122 Pac. 1014.

The respondent contends that the amended complaint was fatally defective in that it did not state that the alleged false representations were made prior to the execution of the contract of purchase. While this is not alleged directly and in so many words, the inference from the allegations of the fourth paragraph above quoted is plain that the representations did antedate the making of the contract, since it is there alleged that the appellant relied thereon and made the agreement. The intention to allege the one as the cause of and inducement to the other is so plain that the respondent can hardly claim to have been misled. Under the liberal rule as to construing pleadings made incumbent upon us by statute (Rem. & Bal. Code, § 307), we are constrained to hold the amended complaint sufficient in this regard.

The respondent also contends that the amended complaint was insufficient in that it failed to state that the appellant or his assignors tendered back deeds of the lands. It is argued that, since the allegations show that on some of the contracts the purchase price had been paid in full, the equitable title was vested in these assignors so as to make an allegation of retender of title by deeds essential to the statement of a cause of action. No authority is cited so holding, and we know of none. Whatever equities the appellant or his assignors had in the land would be fully satisfied and merged by a judgment in his favor. The purpose of reconveyance is to revest the legal title where the purchaser has received the legal title by deed. There is no allegation that the plaintiff or any of his assignors ever received deeds. If in fact any of them have received deeds, their failure to tender reconveyance would be matter of defense. It cannot be raised by a demurrer to the complaint upon the face of which it does not appear that any such conveyance has been made. The amended complaint, though inartificial and unnecessarily vague and inferential in some of its allegations, sufficiently states the causes of action, in the absence of any motion to make it more specific.

There is no defect of parties plaintiff. The action is one to recover the money paid upon each contract on the ground of fraud and deceit in the inception of the contract. According to the allegations of the amended complaint, each contract holder had done all in his power to rescind his contract prior to assigning his claim to the appellant. Each had, as soon as the fraud was discovered, notified the respondent that he refused to carry out the contract because of the fraud, and demanded a return of the money paid. The claim for this money was a chose in action, the right of action for which would survive to the personal representative of the claimant. Such a chose in action is, under Rem. & Bal. Code, § 191, assignable and enforceable in the name of the assignee. *Conaway v. Co-Operative Homebuilders,*

65 Wash. 39, 117 Pac. 716; *Jordan v. Welch*, 61 Wash. 569, 112 Pac. 656; *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. 948; *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123; Pomeroy, Code Remedies (3d ed.), §§ 174, 150; 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1275.

Nor can the judgment of the lower court be sustained upon the ground that there was an improper joinder of causes of action. The statute as to joinder of causes of action (Rem. & Bal. Code, § 296), provides that:

"The plaintiff may unite several causes of action in the same complaint, when they all arise out of,—(1) Contract, express or implied; or . . . (3) Injuries, with or without force, to property."

Authority is not wanting to sustain the doctrine that, where money has been paid upon a contract induced by fraud, it is recoverable in an action for money had and received upon the implied contract to repay. This is upon the broad principle that at common law the common count of money had and received was appropriate for the recovery for money obtained by fraud and deceit. *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 17 Am. St. 178, 6 L. R. A. 121; *Rand v. Columbian Realty Co.*, 13 Cal. App. 444, 110 Pac. 322; *Minor v. Baldridge*, 123 Cal. 187, 55 Pac. 783; *Byxbie v. Wood*, 24 N. Y. 67; *Moses v. Macferlan*, 2 Burrow's Rep. 1005.

But whether the action be considered one for money had and received, or the more usual action in equity for fraud and deceit, the cause of action was, as we have seen, assignable, and the action maintainable in the name of the assignee. It is clear that, if considered as the former and the transactions had all been had with the plaintiff personally, he could have joined all of his causes in one action as upon implied contracts under the first subdivision of the statute. It is equally clear that, if it be considered as an equitable suit for deceit, and the transactions had all been had with

him personally, he could have joined all of causes in one suit under the third subdivision of the statute, as separate causes of action arising out of "injuries, with or without force, to property." This language of the statute is broad and comprehensive. Causes of action for such injuries are unitable, regardless of the means whereby the injuries may have been accomplished. The language is broad enough to cover injuries accomplished by fraud and deceit as well as by any other means. Obviously any actionable wrong whereby one's property is impaired or his estate diminished is an injury to his property. Since all of these causes of action have become united in the plaintiff by the assignments, he may unite them in one action in the same complaint by the very terms of the statute. Any other view is without basis in logic or utility in practice. The causes of action all arose at near the same time and upon exactly the same state of facts. They are now vested in the same person. They can and should be disposed of in one action rather than multiply it by fifty-one. *Benedict v. Guardian Trust Co.*, 58 App. Div. 302, 68 N. Y. Supp. 1082; *Benedict v. Guardian Trust Co.*, 91 App. Div. 103, 86 N. Y. Supp. 370; *Keeler v. Dunham*, 114 App. Div. 94, 99 N. Y. Supp. 669; *Conaway v. Co-Operative Homebuilders, supra.*

The demurrer to the amended complaint should have been overruled. The judgment is reversed, and the cause is remanded for further proceeding.

MOUNT, C. J., FULLERTON, MORRIS, and MAIN, JJ., concur.

[No. 10500. *En Banc.* November 9, 1912.]

THE STATE OF WASHINGTON, *on the Relation of W. J. Murphy, Respondent*, v. T. J. COLEMAN *et al.*, *Commission of the City of Chehalis, Appellants.*[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—SPECIAL ASSESSMENTS—RIGHT TO COMPEL LEVY. A contractor on public work may maintain an action in mandamus to compel the city authorities to levy a special assessment to pay for the work, and is not compelled to resort to an action for damages for breach of the city's contract.

PLEADING—AMENDMENT—DISCRETION. Refusing permission to amend an answer upon sustaining a demurrer thereto, is within the discretion of the trial court, which will not be disturbed except for abuse; and no abuse appears, where the proposed amended answer states no additional facts or defenses material to the action not already pleaded in the original answer (CHADWICK and FULLERTON, JJ., dissenting).

MUNICIPAL CORPORATIONS — IMPROVEMENTS—CONTRACTS—CERTIFICATE BY ENGINEER—EFFECT—FRAUD. Where a contract for public work placed the same under the complete charge of the city engineer, making him an arbitrator between the contractor and the city, and required him to supervise the work as it progressed, and on the completion of the work, to make final estimates and give a written certificate of the amount due, and that, upon the filing of such certificate, the city council should proceed to levy assessments therefor, the city is bound by the engineer's final certificate, even though it be fraudulently given, where the contractor did not participate in the fraud and was guilty of no collusion, and no complaint was made during the progress of the work.

Appeal from a judgment of the superior court for Lewis county, Sol Smith, J., entered February 13, 1912, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action for a writ of mandamus. Affirmed.

C. A. Studebaker and *Preston & Thorgrimson*, for appellants, to the point that it was an abuse of discretion to refuse leave to amend the answer, cited: 31 Cyc. 352; *Stringer v. Davis*, 30 Cal. 318; *State ex rel. Van Houten v. Jones*, 10

[1]Reported in 127 Pac. 568.

Iowa 65; *Gage v. West*, 62 Neb. 612, 87 N. W. 344; *Rose v. Doe*, 4 Cal. App. 680, 89 Pac. 135; *Cornett v. Smith*, 15 Colo. App. 53, 60 Pac. 953; *Newburg v. Farmer*, 1 Wash. Ter. 182; *Cartwright v. Ruffin*, 43 Colo. 377, 96 Pac. 261; *Northwestern Mut. Life Ins. Co. v. Richardson*, 130 Ill. App. 205; *Buchan v. Williamson*, 131 Ga. 501, 62 S. E. 815; *Goff v. Lowe*, 25 Ky. Law 2176, 80 S. W. 219.

Boyle, Warburton & Brockway and *Forney & Ponder*, for respondent.

Crow, J.—Application for a writ of mandamus, brought by W. J. Murphy, relator, against the mayor and commissioners of the city of Chehalis, to compel the levy of a special assessment upon property in a sewer district, sufficient to pay relator $53,026.81, claimed to be due him for the construction of a sewer system. A demurrer to the answer was sustained, and judgment was entered awarding the writ. At the hearing and argument on the demurrer, defendants asked permission to amend their answer. Relator objected to any amendment, but the trial judge indicated that he would pass upon the application when he ruled upon the demurrer. The demurrer was then taken under advisement, with permission to the parties to present additional authorities. On February 10, 1912, the trial judge signed a judgment awarding the writ, without passing upon the application to amend. This judgment was entered on February 13, 1912. On February 19, 1912, the defendants moved the court to vacate the judgment and permit the filing of their proposed amended answer. This motion, to support which affidavits were filed by defendants' counsel, was denied. The defendants have appealed from the final judgment, and also from the subsequent order refusing to vacate the same, or to permit the filing of the amended answer.

The cause was decided upon the pleadings, which are too voluminous to be stated in an opinion of reasonable length. The relator's affidavit making application for the writ, in

substance shows that, on January 11, 1911, he entered into a written contract with the city of Chehalis for the construction of the sewer; that a local improvement sewer district had theretofore been created by ordinance; that the cost of the sewer was to be paid from the proceeds of a special assessment to be levied on benefited property within the district; that, at the time the contract was entered into, Chehalis was a city of the third class, governed by a mayor and common council; that the contract provided that the sewer was to be constructed according to plans and specifications theretofore prepared and adopted; that the work was to be done to the satisfaction of Walter H. Allen, an engineer employed by the city; that the relator, under the supervision of the engineer, constructed and completed the sewer system in full compliance with the plans and specifications and the terms of his contract; that the city council named two of its members as a sewer committee; that the sewer was constructed under the immediate supervision of the engineer, his assistants, and the sewer committee; that, when the engineer and the sewer committee measured the work and made final inspection, they found the work was completed in accordance with the terms of the contract, plans, and specifications, with certain slight exceptions, which they notified the relator to complete and correct; that relator fully complied with these demands; that the engineer thereupon made, certified in writing, and filed with the city council, his final certificate in words and figures as follows:

Chehalis, Wash., Oct. 30, 1911.

To the City Council,
Chehalis, Wash.

Sirs:

W. J. Murphy, contractor for the construction of the sanitary sewers in Local Improvement Sewer District number one, has completed the work according to plans and specifications, and I have accepted the same.

Assessment roll attached hereto.

Respectfully,

W. H. Allen,
City Engineer;

that, at the same time, the engineer made and certified an allowance to relator for extra work, amounting to $1,975.65, and certified to the city council that the total amount due the relator was $53,026.81; that the engineer also prepared and presented to the city council a proposed assessment roll, showing the proper amount to be levied against each piece of property within the assessment district; that the city council took no further action; that shortly thereafter the commission form of government was adopted by the city and that the appellants qualified as mayor and commissioners; that relator demanded that they levy the special assessment, and that they have refused to do so.

The appellants by answer admitted the passage of the ordinance, the execution of the contract and the adoption of the plans and specifications, and denied other allegations of the affidavit. For affirmative defense, they, in substance, alleged, that relator had neither constructed nor completed the sewer in accordance with the terms of the contract; that the engineer had no authority to give the certificate approving the work, and stating the amount due relator; that the engineer's action in so doing was a legal fraud on the city and the property owners within the district; that it would require a vast amount of work and the expenditure of $30,000 to complete the sewer in accordance with the terms of the contract; that in its present condition the sewer is useless; that it will be of no benefit to the property owners within the district, and that no assessment based upon benefits can be made. The answer with much detail sets forth particular instances in which appellants contended the relator has failed to complete the contract. It in effect admits that the work was done under the superintendence of the engineer, who is shown to have been employed by the city. While the answer alleges that the action of the engineer, when he gave the final certificate, was a legal fraud upon the city, it utterly fails to allege that relator was a party to any fraud, that he was guilty of any collusion with the engineer, or that he did not

perform the work, as it was performed, under the immediate supervision and control of the engineer; nor does it allege any fact showing, or tending to show, the participation of relator in any fraudulent acts.

Appellants' first contention is that the relator cannot maintain this action in which he demands a writ of mandamus, but that his cause of action, if any, is one for damages arising from a breach of contract. We find no merit in this contention. We have repeatedly held that a proceeding of this character is a civil action, in which the relator as plaintiff can be afforded the relief to which he may be entitled. *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207; *State ex rel. Barber Asphalt Pav. Co. v. Seattle*, 42 Wash. 370, 85 Pac. 11; *State ex rel. Gillette v. Clausen*, 44 Wash. 437, 87 Pac. 498; *State ex rel. Howe v. Kendall*, 44 Wash. 542, 87 Pac. 821; *State ex rel. Barto v. Board of Drainage Commissioners*, 46 Wash. 474, 90 Pac. 660.

Appellants next contend that the trial court erred in refusing to vacate the judgment and grant them permission to file their proposed amended answer. The granting or refusal of an application to amend is within the sound discretion of the trial judge, and ordinarily his action will not be disturbed unless an abuse of discretion be shown. In this case we are satisfied from the record before us that the trial judge intended to refuse leave to amend the answer at the time he passed upon appellants' demurrer and entered the final judgment, but that by inadvertence he neglected to do so, or to enter any order to that effect. In any event, the final judgment, if correct, will not be vacated for the purpose of granting leave to amend, unless the proposed amended answer discloses additional facts or defenses material to the action, not already pleaded in the original answer. We have examined the proposed amended answer, a copy of which is in the record, and conclude that, while it does to some extent elaborate the original answer, it in reality states no additional defenses, nor does it add to the sufficiency of any de-

fenses theretofore sought to be pleaded. The trial judge doubtless reached this conclusion when he denied appellants' motion to vacate the judgment and for leave to amend. In their briefs, appellants do not direct our attention to any defense tendered by the amended answer which was not included in the original answer, and we are of the opinion that the controlling issues of this case were as effectually presented by the original answer as they would be by the proposed amended answer. This being true, we are unable to find that the trial judge abused his discretion.

The vital and controlling question before us is whether the answer stated a defense to relator's affidavit. The relator contends it does not, as it in effect concedes the fact to be that the contract as performed was performed under the immediate supervision and direction of the engineer employed by the city, that the engineer has approved the work, and that he gave his certificate of approval and of the amount due. Relator therefore insists that appellants are now bound by the engineer's certificate and action, and are estopped from denying the completion of the sewer in accordance with the terms of the contract, without pleading fraud or collusion on relator's part, which they have failed to plead. On the other hand, appellants contend, that the engineer had no authority to make any certificate which would bind the city; that even though such authority be conceded, yet his acceptance of the work under the facts pleaded will not preclude the city from claiming the work was not done conformably to the contract. To sustain these several positions, relator and appellants cite numerous cases from other courts which we do not find it necessary to review. The facts in the cases cited were largely controlling in reaching the final judgments which were entered. We think the law as heretofore announced by this court sustains relator's position, and compels us to affirm the judgment.

The affidavit and answer are copious and of unusual length. It clearly appears from them both, that Allen was employed

as engineer and representative of the city; that he was in charge of the work during its progress and until its alleged completion; that he had the right to require the contractor to discharge any employee engaged upon the work who in his opinion was incompetent, unfaithful, or disorderly; that he had the right to issue a certificate if in his judgment the contractor at any time failed to prosecute the work with diligence, and that upon such certificate being issued the city, after three days' notice to the contractor, would be entitled to provide material and labor and complete the contract; that the contract provided that:

"Whenever in the opinion of the engineer, the contract is fully performed on the part of the contractor, the engineer will proceed with all due diligence to measure up the work and will make out the final estimates and certify them to the city council and to the contractor. . . . .

"Upon receipt of the engineer's estimate and report and a sworn statement from the contractor to the effect that all bills for labor and material against the improvement have been paid, the city council will proceed with the acceptance of and payment for the work as provided by the ordinance and contract under which this work is to be done."

These and many other conditions incorporated in the contract, the execution of which is admitted, establish the fact that the engineer, as the authorized representative of the city, was with its approval in full and complete charge and control of the work during the entire period of construction. It is apparent from the terms of the admitted contract that he not only had authority to require the contractor to remove and reconstruct imperfect work, but that he also stood in the position of an arbitrator between the contractor and the city, with power at all times to determine whether the work was progressing satisfactorily and being properly done. This being true, it would be an injustice to require the contractor to now remove and renew the work, unless it be first shown that he had been guilty of some collusion or fraud. There is no contention that the city, at any time prior to the al-

leged final completion, interfered with, or made any complaint of, the engineer or the contractor. No complaint to the relator appears to have been made at any time prior to the alleged completion of the work. It was the duty of the engineer, as the representative of the city, to see that the work was properly done as it progressed. If he did not do so and made no complaints to the contractor, or demands upon him for changes, he failed to perform his duty as the authorized representative of the city; and in the absence of any showing of fraud, collusion, or intentional wrongdoing upon the part of the contractor, the city should be bound by his acts. In the recent case of *Morehouse v. Clerk of Edmonds*, 70 Wash. 152, 126 Pac. 419, this court, citing numerous authorities, said:

"It is well settled that, in the absence of fraud, an acceptance of a public improvement by the governing body or by the party authorized by the charter, ordinance *or contract* to accept it, is conclusive upon both parties. 1 Abbott, Municipal Corporations, § 288; *Lake Erie & W. R. Co. v. Walters*, 13 Ind. App. 275, 41 N. E. 465; *Whitefield v. Hipple*, 11 Ky. Law 386, 12 S. W. 150; *Atkinson v. Davenport*, 117 Iowa 687, 84 N. W. 689; *Central Bitulithic Paving Co. v. Mt. Clemens*, 143 Mich. 259, 106 N. W. 888; *City Street Imp. Co. v. Marysville*, 155 Cal. 419, 101 Pac. 308, 23 L. R. A. (N. S.) 317. The respondent had the right and power to waive a strict compliance with the terms of the contract. *Lake Erie & W. R. Co. v. Walters, supra; Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 70 Am. St. 472, 43 L. R. A. 678; 28 Cyc. 1054k.

"The respondent has cited *De Mattos v. Jordan*, 20 Wash. 315, 55 Pac. 118, and *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393. In the *De Mattos* case the single question involved was whether an oral approval of the work by the architect was sufficient. It was held that the contract contemplated that his written certificate should be obtained prior to the commencement of the action. In the *Atwood* case it was held that the change made in the work by the engineer was so radical that it was in excess of his powers . . .

"We have uniformly held that it is the duty of an architect or an engineer who has been selected by the parties to

a contract to determine when the contract has been completed, to exercise his honest judgment on the matters submitted to him. He cannot arbitrarily, or capriciously, or in bad faith, refuse to certify to the truth, and thus prevent a party from having the compensation which he has earned. *Craig v. Geddis*, 4 Wash. 390, 30 Pac. 396; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790; *School District No. 5 v. Sage*, 13 Wash. 352, 43 Pac. 341; *McKivor v. Savage*, 60 Wash. 135, 110 Pac. 811; *Skagit County v. Trowbridge*, 25 Wash. 140, 64 Pac. 901."

Here the engineer did not refuse the certificate, but gave it as he was authorized to do. If there were any errors or wrongs committed in the performance of the contract, as appellants now allege, they were committed by the engineer, or at least with his consent. He was the authorized representative of the city and was permitted to remain in control until the alleged completion of the contract. In the absence of any allegation of fraud or collusion upon relator's part, we hold the city is bound by his acts. We might further suggest that, upon the proposed amended answer, we would reach the same conclusion.

The judgment is affirmed.

MOUNT, C. J., MORRIS, ELLIS, PARKER, and GOSE, JJ., concur.

CHADWICK, J. (dissenting)—I think the refusal to grant an amendment was an abuse of discretion, this being a case of public interest. I therefore dissent.

FULLERTON, J., concurs with CHADWICK, J.

[No. 10469. Department One. November 9, 1912.]

ADAM THOMPSON, *Respondent*, v. IDA M. RHODEHAMEL, *Appellant*.[1]

SALES—RESCISSION—RECOVERY OF DAMAGES—INCONSISTENT REMEDIES—ELECTION. The rescission of a sale, and the recovery of damages by way of recoupment, are inconsistent remedies, and cannot be maintained concurrently, but the party should be required to make an election.

ELECTION—RESCISSION AND RECOUPMENT—PRESUMPTIONS—CHATTEL MORTGAGES—FORECLOSURE—DEFENSES. In an action to foreclose a chattel mortgage, the property being in the possession of the plaintiff, in which the defendant pleads a rescission for fraud and asks damages by way of recoupment, in the absence of an election it will be assumed that the defendant relies primarily on the defense of rescission.

SALES—RESCISSION—DILIGENCE. Where defendant purchased a lodging house of plaintiff, and gave notes and a chattel mortgage upon representations that plaintiff had a valid lease of the building and upon his contract to give a lease for two years, and subsequently the owner gave notice that the plaintiff had no lease, the defendant is not estopped from rescinding by delay until eviction four months later, where the plaintiff denied the owner's statement, and claimed at all times that he had a valid lease of the building, the facts being in doubt and disputed; since diligence is a relative question, and defendant had a right to rely on plaintiff's assurance.

Appeal from a judgment of the superior court for King county, Myers, J., entered November 27, 1911, in favor of the plaintiff, after an advisory verdict of a jury favorable to the defendant, in an action to foreclose a chattel mortgage. Reversed.

Moncrieffe Cameron, for appellant.

G. E. Steiner and *Walter B. Beals*, for respondent.

CHADWICK, J.—In March, 1910, Adam Thompson, the plaintiff, was negotiating with the owners of a certain building in the city of Seattle for a lease of the upper floors of

[1]Reported in 127 Pac. 572.

the building which was then occupied by him as a lodging house. He represented to defendant that he had a lease for the building. Accordingly defendant paid the sum of $50 to bind the bargain for the lodging house, and thereafter paid the sum of $750 upon the representation that plaintiff had a lease corresponding with a form exhibited to her at the time. Defendant at the same time executed notes aggregating $1,700, and secured the same with a chattel mortgage upon the furnishings in the lodging house. It transpired that the lease first sent to the owners, who were at the time in the city of Los Angeles, was unsatisfactory to them; they accordingly made some modifications, and signed a lease and sent it to their agent in Seattle, who gave it to the plaintiff to be executed by him and his wife. The lease was made in duplicate. Both copies were taken by the plaintiff. Neither of them was ever returned to the agent of the owner. Although this is denied by plaintiff, we think the preponderance of the testimony shows that plaintiff refused to sign or return the lease, stating as his reason therefor that he would not do so until certain allowances were made for repairs.

Defendant paid rent until the first day of October. After she had drawn a check for the October rent, and had caused it to be sent to plaintiff, notice was served on her by the owner of the building to vacate, and payment of the check was stopped. The same notice was served on plaintiff. Defendant was thereafter evicted, the property covered by the mortgage was set out in the street, and plaintiff took possession of it and began this action to foreclose his chattel mortgage. Defendant answered, setting up fraud and misrepresentation in that she was assured that plaintiff had a lease for the premises and that she could retain the peaceable possession of the premises for the time stipulated in her contract with plaintiff. She asks for a decree rescinding the contract, and for the return of the money paid on the purchase price. She sets up a second cause of action asking for

damages. Plaintiff, by way of reply, and upon the trial, contends that defendant cannot rescind, for the reason that, as early as June, 1910, she had notice, or was informed of facts sufficient to put her upon notice, of the fact that the owner denied that plaintiff had a lease for the lodging house, and that by her acquiescence she has assented to that condition and is without remedy.

A jury was called to advise the court. Upon the return of its verdict holding that plaintiff was guilty of misrepresenting the facts concerning the lease to defendant, the court decided that defendant could not rescind, but was bound by the terms of her contract. This ruling was later modified, the court allowing defendant the sum of $600 by way of recoupment. Upon the settlement of the pleadings, and at all times, plaintiff insisted that defendant could not rescind and at the same time recover damages by way of recoupment, and at all seasonable times moved for an election. In this, we think, plaintiff was right. It is an old rule, still adhered to by this court, that the remedies are inconsistent and cannot be concurrently maintained. *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925. Therefore, in allowing $600 by way of damages, the court erred. In the absence of an election, and with a plea for rescission, the property being in the possession of the plaintiff under foreclosure proceeding, we will assume that defendant relies primarily upon her defense of rescission. The question then is, Can defendant rescind under the facts disclosed?

The court was seemingly of the opinion that, because defendant had some notice in June that the representations made by plaintiff were untrue, and continued to treat the property as her own until October, she is not entitled to rescind, under the authority of *Eldridge v. Young America etc. Min. Co.*, 27 Wash. 297, 67 Pac. 703. That case goes no further than to affirm the general principle that one who is in possession of all the facts must, if he seek rescission on

that ground, act promptly; that one, being informed, cannot treat the property as his own and have rescission. In this case we are satisfied that defendant had no such knowledge or means of information; that is, no means that would put the burden of action upon her. The inducement to her contract was that plaintiff had a lease for at least one year, with the privilege of another, and that she might occupy the premises for a possible term of two years. Although informed by the owner that plaintiff had no such lease, her own landlord, the plaintiff here, insisted at all times, and even insisted upon the trial, that he had such lease. To deny defendant her remedy upon such a showing of fact would be to give an advantage to plaintiff that the law has not hitherto countenanced. Plaintiff cannot be heard to say that his vendee was bound to reject his assurance as untrue and rely upon that of the owner. As between the two, the law will rather sustain defendant in following the assurance of the one who stood in a contractual relation to her. She had paid him $800 in money, and had obligated herself to pay $1,700 more, and it was to him that she was bound to look for protection in her possession.

Plaintiff's position is that defendant owes him the full measure of her bond, because she should have known he had no lease, notwithstanding his contract to give her a lease and his assurance at all times that he had one. He cannot avail himself of defendant's mistake when, but for him, she might have protected herself at an earlier date. Rescission is denied where the facts are plain and were understood, or might with reasonable diligence have been understood; not where the facts are disputed or concealed. Diligence or want of diligence in this class of cases cannot be measured arbitrarily. This is the import of the case of *Freeman v. Gloyd*, 43 Wash. 607, 86 Pac. 1051. We believe the rule to be universal in this country that upon rescission the property must be returned within a reasonable time. The rule is likewise established that what is a reasonable time is a relative

question to be determined by the facts of the instant case.

The judgment of the lower court is reversed, with instructions to enter a judgment in favor of defendant, allowing rescission of her contract and such other relief as is consistent with this opinion. Reversed.

MOUNT, C. J., GOSE, CROW, and PARKER, JJ., concur.

[No. 10587. Department One. November 11, 1912.]

STANDARD BOILER WORKS, *Appellant*, v. NATIONAL SURETY COMPANY, *Respondent*.[1]

MUNICIPAL CORPORATIONS—PUBLIC WORKS—BONDS TO SECURE LABORERS AND MATERIALMEN. A bond under Rem. & Bal. Code, § 1159, to indemnify laborers, mechanics, subcontractors, and materialmen, and all persons supplying such persons with provisions or supplies for carrying on the work, does not cover the cost of repairs upon the steam shovel used by the contractor in the prosecution of the work; since the statute is intended to cover only the things furnished and used directly in the work and entirely consumed thereby.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 5, 1912, upon findings in favor of the defendants, in an action upon a bond given for the protection of laborers and materialmen upon city work, after a trial to the court. Affirmed.

Skeel & Whitney, for appellant.

John W. Roberts and *George L. Spirk*, for respondent.

CHADWICK, J.—The defendant Steenstrup was engaged in the performance of a contract for the improvement of Western avenue and Pike place, in the city of Seattle. Steenstrup employed plaintiff to make certain necessary repairs on a steam shovel which had been rented and was being used by him. The repairs amounted to the sum of $324.15. After the repairs had been made, the shovel was used for a

[1]Reported in 127 Pac. 573.

day or two upon the works. Steenstrup afterwards became a bankrupt, and plaintiff brought this action upon the bond given by the contractor under Rem. & Bal. Code, §§ 1159, 1161. The court held "that said repairs made by plaintiff upon said steam shovel did not in any manner become a part of the said improvement of Western avenue and Pike place, nor was the same labor or material used in said improvement." From a judgment in favor of defendant, plaintiff has appealed, and relies upon the case of *National Surety Co. v. Bratnober Lumber Co.*, 67 Wash. 601, 122 Pac. 337, saying:

"A most liberal construction was [there] allowed. Rent for teams, feed and hay for the same, coal and fuel for the same identical steam shovel were allowed and declared to be contemplated by the statute. Surely repairs, labor and materials on the same steam shovel would be just as lienable. The improvement could not be efficiently prosecuted without this steam shovel, and the whole work would have been delayed had not the repairs been made."

It is true that we so held, but it does not follow that repairs put upon the machine or horses sold to the contractor to be used in the prosecution of the work are recoverable items under the statutory bond. The public is bound upon the theory that the thing furnished or supplied has gone into and become a part of the work; or, to state the proposition in another way, if the public pays for an item, it is because title has passed to it. To the transference of title, the incidental cost of transfer, whether in labor or material, may lawfully be added. The statute means to include:

"Anything that is furnished for, and used directly in the carrying on of the work, and is entirely consumed thereby. Such things do not enter into and become a physical part of the finished structure, as materials do, as that word is generally construed; but they do become as much a part of the structure as the labor which is performed upon it." *National Surety Co. v. Bratnober Lumber Co., supra.*

This is the logic of many of our decisions, more especially: *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541,

Ann. Cas. 1912 B. 225; *Hall v. Cowen*, 51 Wash. 295, 98 Pac. 670; *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766. In none of our own cases, so far as we have been able to discover, have we discussed the item of repairs, but we find the general rule to be that no recovery can be had for machinery used in the prosecution of the work.

"The contract presupposes that the contractor has and will furnish upon his own account the necessary tools, implements and appliances with which to perform the work." *Kansas City etc. v. Youmans*, 213 Mo. 151, 112 S. W. 225.

The logical consequence of this holding is that repairs put upon such machinery do not come within the protection of the law. *Empire State Surety Co. v. Des Moines*, 152 Iowa 531, 131 N. W. 870, 132 N. W. 837; *City of Alpena etc. v. Title Guaranty & Surety Co.*, 159 Mich. 329, 123 N. W. 1126; *City of Alpena etc. v. Title Guaranty & Surety Co.*, 159 Mich. 334, 123 N. W. 1127; *City of Alpena etc. v. Murray Co.*, 159 Mich. 336, 123 N. W. 1128; *United States etc. v. Kimpland*, 93 Fed. 403; *United States etc. v. City Trust, Safe Deposit & Surety Co.*, 23 App. D. C. 155; *City of Philadelphia v. Malone*, 214 Pa. 90, 63 Atl. 539; *Beals v. Fidelity & Deposit Co.*, 76 App. Div. 526, 78 N. Y. Supp. 584.

In *United States etc. v. City Trust, Safe Deposit & Surety Co.*, *supra*, which involved the right to recover for repairs to a dredge used upon a public work, it was held:

"We regard the question as too plain to require any elaboration of argument. As well might the person who constructed the dredging machine in the first instance seek to hold the surety liable, as the person who afterwards makes repairs in order to constitute the machine what it ought to be."

Our conclusion is that a contractor is presumed to be prepared with machinery and appliances necessary to do his work, that such items are furnished upon his credit and not upon the implied credit of the public, and that repairs, if made, will be paid out of the profits of the undertaking.

"Certainly the city could not under any circumstances be subjected to the payment out of the contract price or otherwise for the working equipment procured by the contractor and used by him in carrying on the work. It cannot be assumed that the contract price for the work covered as a part of the cost the purchase of the working equipment which might have been previously used or might be subsequently employed by the contractor in carrying on other work of like character." *Empire State Surety Co. v. Des Moines*, 152 Iowa 531, 549, 131 N. W. 870, 132 N. W. 837.

Finding no error, the judgment is affirmed.

MOUNT, C. J., PARKER, CROW, and GOSE, JJ., concur.

[No. 10603. Department One. November 11, 1912.]

NATIONAL LUMBER & BOX COMPANY, *Appellant*, v. GRAYS HARBOR COMMERCIAL COMPANY *et al.*, *Respondents*.[1]

PRINCIPAL AND AGENT—RELATION — CONTRACT — CONSTRUCTION—PARTNERSHIP. An agreement between box manufacturers was intended to establish an agency for the handling of their manufactured products, and does not create a partnership between them, where it in terms created an agency which was placed in charge of a board of principals upon which each party had a single representative, and the board was empowered to appoint a general agent to act as the agent of the principals "severally and respectively" in making sales and collections, the expressed purpose being to limit the production and fix prices, it being expressly agreed that the agency was to be "several" with no power to bind the principals jointly or create any joint obligation.

PARTNERSHIP—ESTOPPEL TO DENY—EVIDENCE—SUFFICIENCY. Defendants, who were box manufacturers, are not estopped to deny that their selling agency, created with limited power to sell goods and fix prices, was not a partnership, and the plaintiff, a box manufacturer who sold the agency goods, is sufficiently shown to have had notice of the nature of the agency and its powers, where it appears that it was invited to join in the creation of the agency, its sales manager saw the written agreement limiting the powers of the

[1]Reported in 127 Pac. 577.

agency, and its officers fully considered the proposition and declined to enter into the arrangement; there being no evidence that the defendants held themselves out as partners.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered January 20, 1912, upon findings in favor of the defendants, dismissing an action on contract, after a trial on the merits to the court. Affirmed.

Bridges & Bruener, for appellant.

Austin E. Griffiths, for respondent Grays Harbor Commercial Company.

Morgan & Brewer, for respondent Northwestern Lumber Company.

Danson, Williams & Danson (*O. G. Follevag*, of counsel), for respondent Washington Mill Company.

Gose, J.—This action is prosecuted to recover a balance due upon goods which the plaintiff alleges it sold to the defendant corporations, as copartners, doing business under the name of Northern Box Manufacturers' Agency. A judgment of dismissal was entered. The plaintiff has appealed.

The respondent corporations, together with numerous other corporations and individuals, in March, 1902, entered into a written agreement, to continue in force for the term of five years, which recited that each of the contracting parties was a manufacturer of boxes and box materials, and in which it was agreed that a northern box manufacturers' agency should be, and by the agreement was, created; that the purposes of the agency were, to facilitate the distribution and sale of the manufactured products of the manufacturers, the principals under the agreement, such products consisting of boxes and box material; to reduce the cost of the sale and distribution thereof; to protect the principals from loss through sales to irresponsible purchasers; to enlarge to the fullest extent the market for their products; "to promote, encourage, and increase the demand for such product;" "to

regulate the amount of the manufactured product;" to establish and maintain fair, reasonable, and just general prices; to accumulate a fund to be used to promote and carry out the purposes of the agency as set forth in the agreement; and to fix and establish the quota to be furnished to the agency by each of the principals; and providing that no principal should manufacture any product in excess of such quota.

The agreement further named a board of principals, and stipulated that it should be known as the board of principals of the "Northern Box Manufacturers' Agency," and that they should, when acting as such board, be constituted the "agent of each of said principals, severally and respectively, with such powers only as are herein granted;" that the board of principals should have no power to represent or act for the said principals "jointly, or any number of them jointly, or have any power whatsoever to act for, or represent, or in any way bind, any principal jointly with any other principal, or in any way otherwise than separately and severally as to each principal respectively;" that nothing in the agreement should be construed to create any "joint obligation" as to the principals "or any number thereof," or to authorize the board of principals to create any such "joint obligation or liability;" that each principal should be liable only for his proportion or quota of any obligation created by the board of principals, and that the board of principals should have no power to contract or incur any obligation or liability whatsoever, under any circumstances, in excess of the cash on hand, and that it should have no authority to bind any of the parties to the agreement "except when regularly assembled and acting as a board;" that each principal should pay to the board of principals the sum of ten cents per thousand feet on the whole number of feet of lumber constituting its respective quota; and should also pay to the board an additional sum of forty cents per thousand feet on every thou-

sand feet of manufactured lumber sold by it each month; that the board of principals should have the power, when it deemed it necessary, to demand and collect from each principal an additional monthly payment of not to exceed fifty cents per thousand feet on all manufactured lumber sold by each of the principals in any calendar month after the execution of the agreement; that all moneys received by the board of principals under the agreement should be used, invested, or disbursed by it for carrying on the transactions of the agency, or for the expenses of the maintenance and operation thereof; that whenever $25,000 should have accumulated in the hands of the board of principals, it might, if it deemed it advisable, distribute it, or any portion of it, in the proportions provided in the agreement to such principals as should be entitled thereto; that the board of principals should appoint and remove at pleasure a general agent who should, under its direction, "supervision, and control, act as the agent of each of the principals under this agreement, severally and respectively, for the sale of all manufactured product covered by the agreement;" that the general agent should have only such powers "as are in this agreement expressly conferred upon him, or such as may be expressly conferred upon him by said board of principals by resolution duly passed at a regular meeting of said board and entered on the minutes thereof;" that the board of principals should do "any and all things proper, necessary, and feasible to build up the largest possible volume of business and trade for all of the parties to this agreement;" that it should have the power "to fix and establish the price or prices at which all manufactured product shall be sold, and no product shall be sold by any principal to any one, for or at other or different prices which shall in any way be less in amount or lower than that so fixed and established by said board of principals;" that it should have the power "to fix the entire amount of the manufactured product to be manufactured, and to fix and apportion to each principal respectively the quota or proportion of such

entire amount to be manufactured by it or him on the basis of the apportionment fixed by said agreement;" and that the board of principals should, in so far as it was able or as it was practicable to do so, "equalize orders and the demand for the manufactured product proportionally among the principals." The agency was terminated in July, 1906, by a resolution of the board of principals.

The appellant's contention is that it sold to the respondents, under the name of Northern Box Manufacturers' Agency, certain boxes and cannery cases; that their agreement created a copartnership; or that, if it did not create that relation, the respondents are estopped by their conduct to deny that such relation was established. It concedes, however, that its transaction was with the Northern Box Manufacturers' Agency, hereafter called the agency, acting through its manager who had been appointed by the board of principals. The agreement contains about seventeen pages of typewritten matter, and we have set forth only the provisions essential to a correct understanding of the issues.

It seems too clear to require extended argument, that the parties intended to establish an agency for the handling of their manufactured products, and that they did not intend to, and in fact did not, create a partnership as between those who united in the instrument. The agency was placed in charge of a board of principals upon which each party had a single representative, and this board was given authority to appoint a general agent with authority, subject to the supervision of the board, to act as the agent of each of the principals, "severally and respectively," for the sale of all manufactured products "covered by the agreement;" to collect "all proceeds of sales" passing through the agency and subject to the limitation that he should only have such powers as were "expressly conferred upon him" by the agreement, or such as "may be expressly" conferred upon him by the resolution of the board "passed at a regular meeting of said board and entered on the minutes thereof." The purposes of

the agency, as declared in the instrument, are to facilitate the distribution and sale of the "manufactured products of the said manufacturers," the principals in the agreement; to reduce the cost of sale and distribution; to increase the demand and enlarge the market for their manufactured products; to limit the quantity manufactured by the several principals, and "to fix and establish the price or prices at which all manufactured products shall be sold." In short, the purpose was to limit the production and fix the prices of the output of the mills represented in the agreement. It was expressly provided that the board was the agent of each of the principals "severally," and that it should not have the power to "represent or act for the principals jointly or any number of them jointly," or to bind any principal "jointly with any other principal," or other than separately and severally, and that it should not "create any joint obligation as to the said principals or any number of them." The only fair and reasonable construction of the instrument is that it created an agency and not a partnership.

Upon the second contention, i. e. that the respondents are estopped by their conduct to dispute the partnership relation, the court found: "That from the evidence adduced in this case, the court finds that, if the plaintiff did not have actual knowledge of the facts, that no such liability could be created, its information was such as to necessarily put it upon inquiry as to the power and authority of the agency to create such liability." It is argued that this finding is not supported by the evidence. It suffices to say that we have read the evidence on this question, and that our conclusion is that the court would have been warranted in finding that the appellant knew the actual relation between the respondents and the agency. The appellant's manager and sales manager attended some of the meetings of the board, and it was invited to join the agency. Its sales manager testified that he was trying to get the fullest information about the agency; that he may have looked at the written agreement; that it was

probably presented to him by some member of the agency with a view of inducing his principal to join the agency; and that *he* never intended to join it "unless I could show to my superior officers that it would be an advantage to them to do so." In April, 1905, before the date of the alleged sale, the appellant's manager wrote the general manager of the agency, that he would not join the agency; that he could not see "where we would be benefited in joining . . . under the present conditions," and that "we are willing to give our word or bond if necessary that we will maintain association prices." It is apparent, we think, that the appellant carefully considered the agency agreement, and then declined to become a party to it. In no other way could its officers as business men determine the feasibility of becoming a member of the agency. The evidence is too clear on this question to merit further consideration.

There is no evidence that the respondents held themselves out or permitted themselves to be held out as copartners, or that the appellant was led by their conduct to believe that it was selling its goods to them. It follows that a liability cannot be predicated upon the principle of equitable estoppel. *Thompson v. First Nat. Bank*, 111 U. S. 529. The law does not surprise parties into a partnership against their will, in the absence of ratification or estoppel. 30 Cyc. 252; 31 Cyc. 1574-5-6.

The appellant contends further that the respondents are liable because the agency did not disclose all the material circumstances attending the transaction. This position again assumes that the respondents have by their conduct estopped themselves to rely upon the restrictions which they so carefully put upon the authority of the agency. There can be no estoppel when the party asserting it knew that no authority in fact existed, or when as a reasonably prudent man he should have known that fact, as where he was acquainted with the facts that should have suggested an inquiry which, if pursued, would have led to the truth. 31 Cyc.

1243, 1244; *Graton & Knight Mfg. Co. v. Redelsheimer*, 28 Wash. 370, 68 Pac. 879.

We think that the appellant knew that the agency, acting through its general manager, was intending only to act in the capacity of its factor the same as it was acting for its members; and that it knew the purposes of the agency and the extent of its authority. It follows that there can be no recovery against the respondents.

Whether the agreement constituted a combination in restraint of competition, and if so, what effect it would have upon the appellant, we need not consider, as the point is neither briefed nor argued.

The judgment is affirmed.

MOUNT, C. J., CROW, PARKER, and CHADWICK, JJ., concur.

[No. 10542. Department One. November 11, 1912.]

SOREN SORENSON, *Respondent*, v. DANAHER LUMBER COMPANY, *Appellant*.[1]

CONTINUANCE—ABSENCE OF WITNESSES—DISCRETION. It is not an abuse of discretion to deny a continuance on account of the absence of a witness, defendant's general manager, needed in the preparation of the defense, where it is admitted by the plaintiff that the witness if present would testify as it was claimed he would, and another witness testified in substance to the same effect, and was better able to give assistance in preparation than the manager.

MASTER AND SERVANT—SAFE PLACE—GUARDING DANGEROUS MACHINERY—FACTORY ACT—INSTRUCTIONS. In an action for personal injuries to an oiler, caught by a conveyor chain which was unguarded at a point where he was compelled to stoop and cross under it, the court is not called upon to give instructions upon the theory that the defendants had made an honest effort to guard the chain under the factory act, where there was no pretense that it was guarded at this point; and it is sufficient if the jury was instructed that the plaintiff cannot recover if the conveyor chain was reasonably safeguarded.

[1]Reported in 127 Pac. 586.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 6, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries to an oiler in a sawmill. Affirmed.

Hudson, Holt & Harmon, for appellant.

Govnor Teats, Hugo Metzler, Leo Teats, and *Ralph Teats*, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries which the plaintiff alleges resulted to him while employed as an oiler in the defendant's sawmill, from the failure of the defendant to guard certain machinery therein as required by the factory act. From a verdict and judgment in favor of the plaintiff, the defendant has appealed.

Counsel for appellant contend that the trial court erred in denying their application for a continuance when the cause was proceeding to trial, on account of the absence of the manager of appellant's mill, caused by his sickness. In making the application, counsel stated the facts expected to be proven by the testimony of the manager, which statement was accepted by opposing counsel and the court in lieu of the usual formal affidavit for continuance. Upon the admission of counsel for respondent that the manager would, if present, testify as stated by counsel for appellant, and consenting that such testimony be considered as actually given upon the trial, the court denied a continuance. The millwright of appellant, employed about the mill, was present during the trial and testified in behalf of appellant to facts amounting, in substance, to all that it was claimed the manager would testify to. It was also claimed by counsel for appellant that the presence of the manager of the mill at the trial was necessary to a proper presentation of the defense, in that his aid and advice to counsel in the course of the trial were necessary. It is apparent from the record, however, that the presence of the millwright was of substantially the same

benefit to counsel as the presence of the manager would have been. Indeed, the record furnishes ground for belief that the millwright, by reason of his familiarity with the construction and arrangement of the particular machinery involved, was better able to assist counsel during the course of the trial than the manager would have been if present. Clearly there was no abuse of discretion in denying appellant's application for a continuance under these circumstances.

Other contentions of counsel for appellant are made upon the failure of the court to give a number of instructions as requested by them. These requested instructions were numerous and of considerable length. A careful comparison of them with those given by the court convinces us that the court's instructions covered in substance the same ground, so far as the case required, and were as favorable to appellant as it was entitled to. The only ones we deem it necessary to notice are certain instructions requested by counsel for appellant upon the theory that the evidence might warrant the conclusion that appellant had made an honest effort to comply with the factory act in guarding the particular machinery involved. We do not think that the evidence was such as to call for any instructions upon this theory. Respondent's sleeve was caught on one of the lugs attached to the chain of a sawdust conveyor at a place where the chain and lugs of the carrier returned under the carrier. There was no pretention that there was any guard at this particular place, yet it is apparent that it was necessary for respondent, in performing his duties as oiler, to pass under the chain and lugs at this place, and that he was required to stoop in so doing. Being caught upon one of these lugs, he was carried along four or five feet, and his hand carried into a sprocket wheel over which the chain and lugs ran. Appellant insists that a certain small iron girder, a part of the frame of the structure, in front of this sprocket wheel, acted as a guard to keep persons away from the sprocket wheel. Respondent was drawn over this iron girder onto the sprocket

wheel where he received his principal injuries. Assuming that this girder acted in some degree as a guard to keep persons away from the sprocket wheel, it was in no sense a guard to keep persons from coming in contact with the chain and lugs at the point where respondent was caught. The trial court, however, did instruct the jury that they were to determine:

"Whether or not the sprocket wheel and conveyor chain on which the plaintiff claims to have been injured were, at the time of the accident and injury, reasonably safeguarded; and if you find that it was so safeguarded, then your verdict must be for the defendant, for the plaintiff's right of action rests upon the allegations in his complaint that he was injured by the failure to reasonably safeguard the machinery by which he was injured."

This instruction we think was, in any event, all that appellant was entitled to have given to the jury. We conclude that the jury was fully and fairly instructed.

The judgment is affirmed.

MOUNT, C. J., CHADWICK, CROW, and GOSE, JJ., concur.

[No. 10598. Department One. November 11, 1912.]

CARL BLOM, *as Administrator etc., Respondent*, v. BLOM CODFISH COMPANY, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—ELECTION. In an action tried to the court, it is not prejudicial error to refuse to compel the plaintiff to elect between a cause of action upon an implied contract for services rendered, and a second cause of action upon a promissory note alleged to have been given as collateral security for the account due for services, where judgment was asked only upon the first cause of action and the note was ignored at the trial and in the decision.

EVIDENCE—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT—IMPLIED CONTRACT. Books of account, openly kept by a general manager of a corporation for five years during which he had full charge of the

[1]Reported in 127 Pac. 596.

business, containing entries crediting himself with a monthly salary, are admissible as tending to show an implied contract to pay a reasonable sum for his services, when the books were open to the inspection of the officers and trustees of the corporation, who made no objection thereto except an objection to one raise in the salary.

SAME. Books of account, kept by a general manager of a corporation, are admissible for the purpose of showing the charges and credits against and in favor of the manager, since deceased, where, although not kept with the skill of an expert, they fairly show the transaction of the business covering a period of five years during which he was in control and the books had been at all times open to inspection of the officers, who made no objection thereto.

CORPORATIONS — OFFICERS — EMPLOYMENT — IMPLIED CONTRACT. Where a president and trustee of a corporation rendered services as a general manager with the consent of the other officers, he can recover on an implied contract for services as general manager, without any express contract therefor.

CORPORATIONS—OFFICERS—SERVICES—SALARY—FORFEITURE FOR FRAUD. Failure of a general manager working on a regular salary, to charge himself on the books with all the items properly chargeable to him, does not necessarily render him guilty of such fraud as to forfeit all his salary; especially where explanations are wanting through his decease, and all doubts were resolved against his estate.

APPEAL—REVIEW—HARMLESS ERROR. The admission of account books in evidence cannot be alleged as error, where the items considered in the account were credits favorable to appellant and reduced the claim.

CORPORATIONS—STOCK—SUBSCRIPTIONS—FULLY PAID STOCK. Where a corporation issued fully paid stock to stockholders in a corporation which it superseded, in consideration of the assets and good will of the first company, it cannot claim that the stock was not fully paid for because certain stock of the first company was not fully paid up; especially where it issued additional stock to equalize the prices paid for the stock of the first company.

LIMITATION OF ACTIONS—ACCOUNT—MUTUAL OPEN ACCOUNT. An account is a mutual, open account against which the statute of limitations does not run, where at no time six months intervened between any two payments; and it is immaterial that the books showing the charges were kept by one of the parties, where they were not his books, but were kept as general manager of a corporation, and the officers had access to the same.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered January 16, 1912, upon findings in favor of the plaintiff, in an action on contract. Affirmed.

Willett & Oleson, for appellant.

J. A. Sorley, for respondent.

PARKER, J.—This action was instituted in the superior court by the administrator of Torvald D. Blom, deceased, to recover compensation for services rendered by him during his lifetime to the Blom Codfish Company, a domestic corporation. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

In May, 1905, the Blom Codfish Company of California was incorporated under the laws of that state, with its principal place of business at San Francisco. Its purpose was to engage in catching and marketing codfish, and soon thereafter it constructed a plant in Alaska, and also one at Dockton near Tacoma, in this state. It prosecuted its business continuously until January, 1907, when appellant Blom Codfish Company was incorporated under the laws of this state, with its principal place of business at Tacoma. The records of the California corporation, other than certain of its books of account, are not in evidence in this case; but records of appellant, the Washington corporation, in evidence here disclose the fact that it was organized by the same persons who owned the stock in and controlled the California corporation, and for the purpose of taking over all of the business and property of that corporation. In January, 1907, in pursuance of this purpose, appellant acquired all of the good will, business and property of the California corporation and, by resolution then entered in its minutes, assumed all of the debts and liabilities of the California corporation. It also caused to be issued to each of its stock subscribers, respectively, a like number of shares of its stock to that held by them in the California corporation, in

consideration of the good will, business, and property of that corporation then acquired by appellant. All of the stockholders of the California corporation thus became stockholders in appellant, the Washington corporation. So far as the business of the two corporations is concerned, the transfer amounted only to a change of location, even the name remaining the same. While appellant procured and opened new books of record for its minutes and stock it did not procure or open new books of account, but continued to use the same ledger, cash book, journal, etc. used by the California corporation; which books show the accounts of both corporations, with the items entered therein in chronological order since January, 1905, without any indicated change in the ownership of the business.

From the organization of the California corporation until September, 1910, Torvald D. Blom was in full charge, and had the entire active management of the business. During that period he devoted practically all of his time to the management of the business. He was captain of a fishing schooner used in the business on some of its fishing trips to Alaska, and at other times attended to purchasing stores and provisions needed in the business and to preparing and marketing fish. He had supervision over all the employees, of which, at times, there were a considerable number. The books of account were kept by him, or under his direct supervision, during this whole period in which he had control of the collection and disbursement of the funds. He was a trustee and also president of both companies during this period. He caused himself to be credited upon the books with $150 per month salary up until April, 1908, $75 per month thereafter until September, 1908, and $125 per month thereafter. These credits appear to have been entered upon the books regularly on the last day of each month, except that there are five months in one credit made October 2, 1905, three months in one credit made December 31, 1905, five months in one credit made August 31, 1908, five months in one credit made

August 31, 1909, and four months made in one credit September 6, 1910. He died on September 10, 1910.

The nature and extent of the service he rendered was at all times well known to the trustees and others interested, and his claim for salary, as evidenced by these credits, would be clearly apparent to any one making the most casual examination of the books. The books were at all times open and accessible to the trustees and others interested. There is no evidence in the minutes showing formal authorization of the employment of Blom as general manager of the business, nor is there any evidence therein showing any formal action of the trustees fixing his salary as president, or for any other service he rendered the corporation.

The trial court concluded that these facts showed an implied contract of employment of Blom to render the services he did, and an implied agreement on the part of both corporations to pay him a reasonable compensation therefor; and also found that such services were reasonably worth the amounts he caused to be credited to himself upon the books. After deducting from the total of these credits all of the charges Blom had caused to be made against himself upon the books, the trial court found that he was chargeable with certain other items with which he had failed to charge himself. These items the court deducted from the balance claimed by the administrator, and rendered its judgment accordingly, in favor of the administrator and against appellant, for the sum of $3,172.64, with interest from September 10, 1910, the date of Blom's death. Other facts will be noticed as may become necessary in our discussion of the several questions presented.

It is contended by counsel for appellant that the court erred in denying their motion to strike from the complaint the second cause of action, or in the alternative to require respondent to elect between the two causes therein stated as to which he would proceed to trial upon. In his first cause of action, respondent pleads facts upon which he rests his right

to recover from appellant the sum of $6,118 as the reasonable value of services rendered by Blom. In his second cause of action, respondent pleads the execution of a promissory note by appellant to Blom for the sum of $5,000 payable upon demand, and also alleges "that said note was given as collateral to said account due for services." Judgment was demanded for the sum of $6,118 only, as if there were pleaded but one cause of action. Had this manner of pleading resulted in uncertainty or confusion in the issues, as it possibly might have done had the cause been tried by a jury, as in the case of *Gabrielson v. Hague Box & Lumber Co.*, 55 Wash. 342, 104 Pac. 635, 133 Am. St. 1032, relied upon by counsel, there would be some plausible ground for the contention made. But it is manifest from the record that the court tried the case upon the theory that there was but one cause of action pleaded, and received the note in evidence only for the purpose of explaining the entry of a charge of an equal amount made against Blom upon the books at the time of the execution of the note. The note was entirely ignored by the court as the basis of a cause of action. Plainly no prejudice resulted to appellant from the ruling complained of.

It is contended that the books were erroneously admitted in evidence. This contention seems to be rested upon the theory (1) that, having been kept by Blom or under his direct supervision, they constitute inadmissible self-serving declarations; (2) that there is no evidence that the persons making the entries had actual knowledge of the transactions recorded; and (3) that the books upon their face appear to be so illy kept as to render them incompetent as proof of the transactions recorded. These books, it seems to us, are to be viewed in two aspects: Are they admissible as tending to show an implied contract of the corporation with Blom to pay him for his services, and are they admissible to show the items he was chargeable with and the balance due him at the time of his death?

In view of the nature and extent of the services rendered by Blom, we think the fact that he was the active manager in charge of the entire business during this whole period with the full knowledge and consent of the trustees and others interested, the fact that he openly caused these credits for salary to be made upon the books covering this entire period of nearly five years, charging against such credits the items of cash received by him at frequent intervals during the whole of the same period, the fact that the merest casual examination of the books would disclose all of these credits and charges, and the fact that the books were at all times open and accessible to all of the trustees and others interested who presumably had knowledge of their contents, render such books admissible as tending to show an implied contract for the rendering by Blom of such services as general manager of the business, and to pay him a reasonable compensation therefor. The fact that the credits so caused to be made by Blom in his favor upon the books standing alone may in a sense be regarded as self-serving, we think does not render them inadmissible, in view of the attending circumstances we have noticed. There is no evidence that the trustees, or any other person interested, ever made any objection to these credits for salary, except that there is some slight evidence tending to show that there was some objection raised to the amount of his salary in October, 1908. This evidence, whatever its weight may be, would seem to tend to prove an understanding existing between Blom and the company that he was to receive at least reasonable compensation for his services.

That the books were admissible to show items of cash received by Blom during the period they covered, seems clear, since such entries are against his interest. But whether the books are admissible for the purpose of showing that such entries constitute all of the items he is chargeable with, is the real question here. While the books do not appear upon their face to have been kept with that degree of skill one might expect from an experienced bookkeeper, they do, nevertheless,

fairly show the transactions of the business covering the entire period from 1905 until September, 1910, assuming that the entries therein made state the truth. While the trial court found that Blom was chargeable with a number of items not charged to him upon the books in his ledger account, the additional items so found by the court to be chargeable to him were all taken from the books. In other words, the court proceeded upon the theory that the books themselves showed the items Blom was chargeable with though such items were not all charged to him in his ledger account. We think under these circumstances the books were admissible in evidence to show the entire amount of the items Blom was chargeable with, and that the balance due upon the total amount of his salary as found by the court was determinable by this method. It is not so much a question of the knowledge of the transactions upon which the charges rest, possessed by the persons who actually entered them, as it is whether there are any other items chargeable against Blom. We are of the opinion that the books were admissible in evidence for this purpose, and that, under the circumstances, in the absence of evidence showing other proper charges against Blom, the trial court was warranted in concluding that the proper charges which were discoverable upon the face of the books were all that should be made against Blom.

It is contended that respondent should not recover because of the want of an express contract on the part of appellant or its predecessor to pay him for the services rendered. This contention is rested upon the theory that, Blom being a trustee and the president, he was not entitled to compensation in the absence of express contract to that end. So far as his services as trustee or president are concerned, we may concede that counsel's contention is correct. The trial court awarded judgment in respondent's favor upon the theory that the services for which Blom was entitled to salary were not rendered by him as president or trustee, but as general manager of the business apart from the duties incident to such offices.

In view of the nature and extent of the services rendered by him, we think that the record fully justifies the conclusion of the trial court upon that theory. The rule relating to the allowance of reasonable compensation for services, performed for a corporation by a person who is also an officer of the corporation, when such services are rendered apart from the duties incident to such office, is stated in 3 Clark and Marshall on Private Corporations, p. 2053, as follows:

"By the overwhelming weight of authority, the doctrine that the directors and other managing officers of a corporation are not entitled to compensation, in the absence of express provision or agreement therefor, does not apply to unusual or extraordinary services,—that is, services which do not properly pertain to their office, and are rendered by them outside of their regular duties. If such services are rendered by a director or other officer at the request of the corporation or the board of directors, with the understanding that they are to be paid for, the law will imply a promise, in the absence of any special agreement, to pay what they are reasonably worth."

See, also, 21 Am. & Eng. Ency. Law (2d ed.), 909; 10 Cyc. 922. The decisions of this court in *Cors & Wegener v. Ballard Iron Works*, 41 Wash. 390, 83 Pac. 900, and *Argo Mfg. Co. v. Parker*, 52 Wash. 100, 100 Pac. 188, are in harmony with this view.

It is contended that Blom's failure to charge himself with the items with which the trial court found he should have charged himself rendered him guilty of such fraud that he forfeited all right to compensation for his services. The question of forfeiture of all compensation under such circumstances must be governed largely by the circumstances of each particular case. While, according to the trial court's findings, Blom did fail to properly charge himself with certain items he should have been charged with, the trial court concluded that under the circumstances he was not guilty of such fraud as to warrant a forfeiture of all his compensation. The rule seems to be somewhat more rigid against an agent performing some particular service, and especially where his

compensation is to be in the form of commissions, than as to an employee working upon a salary. In the text of 26 Cyc. 1040, it is said:

"A breach of the contract of employment other than by quitting the service may prevent a recovery of any wages thereunder, as where the employee embezzles the money of his employer, or commits other criminal offenses, although not immediately injurious to the person or property of the employer. But a breach, after part performance, where it does not go to the essence of the contract will not prevent a recovery thereon, except where the breach was wilful and intentional. If the employee has failed to perform the contract according to its terms, but the employer has received the benefit of the labor which exceeds the damage resulting from the breach of the contract, a recovery on a *quantum meruit* is ordinarily permissible; and this is true whether the labor was received by the assent of the employer before the breach or whether it was received after the performance of all the work which was in fact done."

We are of the opinion that, under the circumstances of this case, the trial court was not in error in declining to adjudge a forfeiture of the whole of Blom's salary. In the trial court's memorandum decision filed in the cause, it is apparent that the entries found in the books of account here involved, as well as the books as a whole, were examined by the court in detail with great care, and that the court resolved all doubts in favor of appellant and against respondent, applying the rule of requiring strict account from agent to principal where their relations are as here shown, and placing the burden of explaining doubtful items upon respondent. That want of explanation at least as to some of these items may have resulted from the fact that Blom was dead is not at all improbable.

It is contended that the court should not have gone back of the organization of the Washington corporation, the appellant, which occurred in 1907, in considering the books of account as evidence in this case. That no prejudicial error resulted to appellant from this source is shown by the fact

that it appears from the books that whatever salary was charged and earned by Blom while working for the California corporation had been paid at the time of the transfer of the business to the Washington corporation. The ledger account upon which the monthly salary credits are shown appears to have been balanced on December 31, 1906. The items of account taken into consideration by the court, which should have appeared against Blom prior to the change to the new corporation, resulted in charges of some items against Blom by the court which would not have been so charged had the court ignored all entries in the books prior to the change of the business to the new corporation. So, instead of this being prejudicial to appellant, it worked to its advantage.

It is contended that Blom at the time of his death was indebted to appellant upon his stock subscription. The theory of this contention seems to be that Blom originally received his stock in the California corporation at a considerably less cost than par, though it is apparent that it was regarded as having been then paid for in full. Some other stock in the California corporation appears to have been paid for at a higher price than Blom paid for his. It seems to us, however, that this question is not open here, since the new corporation, the appellant, by resolution entered upon its minutes, caused to be issued to its stockholders the same number of shares they each had in the California corporation, in consideration of the transfer of the business, good will, and property of that corporation to the new corporation; and it is apparent from the record that it was intended that all should receive such stock in the new corporation as fully paid up stock. It also appears that the trustees of the new corporation, in order to equalize the price paid for stock in the California corporation, decided to issue sufficient additional stock to all stockholders who had paid for their stock in the California corporation in excess of that paid by Blom and some others. It appeared that all of the capital stock

had not then been taken, and that there was stock yet in the new corporation sufficient to supply this need. We think under the circumstances this is not a charge which appellant can now insist shall be made against Blom or his estate. Just what right creditors might have in this regard, in a proper proceeding, we need not now determine.

Some contention is made based upon the statute of limitations. The trial court regarded the account running between Blom and the corporations as an open mutual account, finding that the last charge made to Blom was on the 6th day of September, 1910, shortly before his death, and that at no time did so much as six months intervene between any two payments made by appellant to Blom to apply on his salary. This finding is fully justified by the entries made in the books showing the receipt by him of payments from time to time. This, we think renders it a mutual open account such as to toll the statute of limitations under Rem. & Bal. Code, § 166. Some contention is made that Blom could not thus toll the statute by merely making these charges, or causing them to be made. But we must remember that these credits were made not upon Blom's books but upon the books of the company which were kept by him or under his direction in the usual course of business; and we have also seen that the presumption is that all of these entries were within the knowledge of the trustees. Counsel are not contending that Blom did not actually receive the amounts charged from time to time. We think it follows that no part of the balance due upon Blom's salary is barred.

Other contentions made by counsel for appellant we think are without merit, and are not such as require discussion. Among other contentions made, argument is advanced at considerable length upon the correctness of the court's findings. We deem it sufficient to say that we have read the entire record, and while the facts are much involved and the case is very difficult of solution with any degree of exactness, we are of the opinion that the learned trial court has given the

details painstaking attention, and after allowing credits to appellant and resolving doubts in its favor, a correct conclusion has been reached upon the respective rights of the parties.

The judgment is affirmed.

MOUNT, C. J., CHADWICK, GOSE, and CROW, JJ., concur.

[No. 10597. Department One. November 12, 1912.]

C. N. REITZ *et al.*, *Plaintiffs*, v. M. E. BRYANT, *Appellant*, M. O. CARTON, *Respondent*.[1]

BROKERS—CONTRACT FOR COMMISSIONS—PERFORMANCE AND OPERATION—FRAUDS, STATUTE OF. Under Rem. & Bal. Code, § 5289, requiring a contract employing a broker to sell real estate upon a commission to be in writing, a broker cannot recover for effecting an exchange of his principal's property, where the written contract employed him to make the exchange for certain specified property, which on inspection proved unsatisfactory and such trade was never consummated, although the broker was afterwards instrumental in effecting an exchange for other property not mentioned in the written contract of employment.

Appeal from a judgment of the superior court for King county, Gay, J., entered December 5, 1911, upon findings in favor of a garnishee, in an action on contract. Affirmed.

Reeves Aylmore, Jr., for appellant.

Miller & Lysons, for respondent.

PARKER, J.—This action was commenced and prosecuted to final judgment in the superior court by C. N. Reitz et al. against M. E. Bryant et al. M. O. Carton was served with garnishee process at the instance of the plaintiffs, and having answered that he was not indebted to any of the defendants, the plaintiffs did not controvert his answer. The defendant Bryant, however, did controvert the answer of the

[1]Reported in 127 Pac. 583.

garnishee defendant. Issues being formed by proper pleadings under the direction of the court, as provided by Rem. & Bal. Code, § 702, upon the question of Carton's indebtedness to Bryant, a trial before the court without a jury was had, resulting in a judgment in favor of the garnishee defendant Carton, dismissing the garnishment proceedings. Defendant Bryant has appealed from that judgment.

Appellant seeks to recover from respondent $1,000, as compensation claimed by him to have been earned under the following written contract:

"This agreement, made and entered into this 15th day of May, 1911, by and between M. O. Carton and M. E. Bryant, in effecting exchange or sale for the property of M. O. Carton known as 5 lots fronting 120 feet on Fremont Avenue in Denny and Hoyt's Supl. Addition to the City of Seattle. The above property to be exchanged for two hundred fifty acres of land in Medford, Jackson County, Oregon, owned by P. S. Barneburg and held under contract by Aylor and Boyd of Medford, Oregon. M. O. Carton agrees to pay for effecting said deal, a commission of One Thousand Dollars ($1,000) and M. E. Bryant agrees to accept the same in a tract or parcel of land at the price paid by M. O. Carton. Land to be delivered by good and sufficient deed, free and clear of all encumbrances to the value of One Thousand ($1,000) Dollars in full for the above commission.

"M. O. CARTON,
"M. E. BRYANT."

Negotiations looking to the exchange of the properties mentioned in this contract had proceeded to the stage that such exchange depended upon respondent's personal examination of, and becoming satisfied with, the Oregon property with which he was then unacquainted. A tentative written sale agreement was, on the date of the compensation contract above quoted, entered into between the owners of the Oregon property and respondent, containing the following provision:

"M. O. Carton agrees to go at once to Medford, Oregon, and examine the property herein referred to of Aylor and Boyd, and if the same proves satisfactory the parties hereto

agree to effect through M. E. Bryant an exchange or sale as may be best determined by the parties interested after such examination has been made by M. O. Carton."

In pursuance of this understanding between all the parties, respondent and appellant proceeded to Medford, Oregon, when the property there located was examined, and it proving to be unsatisfactory to appellant, he declined to consummate the exchange, and such exchange never was consummated upon any terms. While at Medford and soon after declining to carry out the exchange as theretofore tentatively agreed upon, respondent became interested in other property owned by other persons in the neighborhood of Medford, which resulted in his acquiring such other property by an exchange of his Seattle property therefor, and assuming an obligation to pay therefor a considerable sum in addition. For the sake of argument, we may assume that appellant was instrumental in bringing about the consummation of this deal.

It is contended by appellant that, since he was instrumental in bringing about an exchange of respondent's property for other property in Oregon than that mentioned in their compensation contract above quoted, he is entitled to $1,000 commission thereon, resting his claim upon this contract. The theory of counsel for appellant seems to be that he is entitled to this compensation, as if he had been employed by written contract and thereby given general authority to find a purchaser for appellant's Seattle property. We think that appellant's right to such compensation cannot be maintained upon this theory. The compensation contract refers to the exchange of specifically named property. It will be noticed that it is expressly provided in the contract that appellant agrees to accept his $1,000 commission "in a tract or parcel of land, at the price paid by M. O. Carton." The only reasonable inference to be drawn from this provision is that the land appellant was to accept in payment of his commission was a portion of the same land that respondent was to acquire by that proposed exchange. This fact lends support to the

view that the compensation contract limited the service to be rendered to an exchange of the specified properties, or in any event to an exchange of property between the same persons. It seems clear to us that the compensation which appellant is here seeking to recover is for an entirely different service and one to which the contract he sues upon has no reference whatever. This is not a suit to recover reasonable compensation for services rendered upon an implied contract. The fact that there was no contract in writing to support a claim for the services claimed to have been rendered would defeat appellant's claim therefor under our statutes requiring such a contract to be in writing, in any event. Rem. & Bal. Code, § 5289.

The judgment is affirmed.

MOUNT, C. J., CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10846. Department One. November 12, 1912.]

LEVA GRIFFITH, *Appellant*, v. DANIEL GRIFFITH, *Respondent*.[1]

DIVORCE—APPEAL—POWER OF APPELLATE COURT—PROTECTION PENDING APPEAL. The supreme court will not, pending appeal in a divorce case, restrain the husband from violence, in violation of an order restraining him, since adequate remedy is provided by statute.

DIVORCE—APPEAL—JURISDICTION—TEMPORARY ALIMONY AND SUIT MONEY. Upon appeal by the wife from a judgment denying a divorce, the appellate court will, in aid of its appellate jurisdiction, award her temporary alimony and suit money for an efficient preparation of her case (Reversed on Rehearing).

SAME—ALLOWANCE FOR ALIMONY—SUIT MONEY. A wife in necessitous condition will be awarded temporary alimony of $20 per week for the support of herself and children, with possession of the family home, and $150 suit money and attorney's fees for prosecuting an appeal from a judgment denying a divorce, where there was evidence that the community owns property of the value of

[1]Reported in 127 Pac. 585; 128 Pac. 636.

$30,000 or $40,000, which the defendant admitted was of the value of $5,000, over and above all indebtedness (Reversed on Rehearing).

ON REHEARING.

DIVORCE—APPEAL—JURISDICTION—TEMPORARY ALIMONY. Under the constitution, limiting the original jurisdiction of the supreme court to special writs and to all other writs necessary and proper to the complete exercise of its appellate jurisdiction, the supreme court has no jurisdiction, pending an appeal in a divorce case, to award the wife temporary alimony, suit money and attorney's fees for the prosecution of her appeal (GOSE, J., dissenting).

Application filed in the supreme court October 31, 1912, for alimony, suit money and injunctive relief, pending an appeal in an action for divorce. Granted in part.

Frank H. Kelley, for appellant.

Rickabaugh & McElroy and *Williamson, Williamson & Freeman*, for respondent.

GOSE, J.—This is an application for an order restraining the respondent from harassing the appellant, and for alimony, suit money, and attorney's fees. The action is for divorce. The plaintiff was unsuccessful in the court below, and has appealed.

In the court below an order was entered *pendente lite*, giving the appellant possession of the family home at 424, South J street, in the city of Tacoma, giving her $20 per week for the support of herself and minor children, and restraining the respondent from harassing or interfering with them. Affidavits have been filed here on behalf of the appellant showing that the respondent has threatened her and the children with violence. This he denies.

The law affords her ample protection against threatened violence in courts of original jurisdiction. If her statements in this behalf are true, she should present her facts to the prosecuting attorney of her county or to some magistrate. It would seem farcical for this court to direct the issuance of an order restraining the respondent from committing a crim-

inal offense when a more adequate remedy is provided by statute. The application in this respect will be denied.

Touching the question of alimony, suit money, and attorney's fees, the appellant's affidavits show that the community owns property of the value of thirty to forty thousand dollars, and that she is in a necessitous condition. The respondent's affidavit shows, that the value of the community property after deducting the indebtedness does not exceed $5,000; that the real estate is heavily incumbered; that a large amount of indebtedness will mature in about sixty days, and that he has no money with which to meet it.

The law gives the right of appeal in divorce cases, and the wife is entitled to be provided out of the community property with means to secure "an efficient preparation of her case" on appeal. If this is denied her by the trial court, this court may, in aid of its appellate jurisdiction, meet the situation. *Holcomb v. Holcomb*, 49 Wash. 498, 95 Pac. 1091; *Sullivan v. Sullivan*, 49 Wash. 508, 95 Pac. 1095; *Gallagher v. Gallagher*, 65 Wash. 310, 118 Pac. 4; *Gust v. Gust*, 69 Wash. 220, 124 Pac. 504. The fact that the wife prosecutes the appeal does not militate against this right. *Gust v. Gust, supra.* The property belongs to the community, and she is as much entitled to use it in aid of her rights in the divorce action as the husband. It is the duty of the courts, however, to conserve the property for the benefit of the community and its members respectively.

The order giving the appellant the right to occupy the family home at 424 South J street, in the city of Tacoma, and $20 per week alimony for the support of herself and minor children *pendente lite*, will be continued. She will also be allowed $75 suit money, and $75 attorney's fees for the purpose of prosecuting the appeal. An order will be entered directing the respondent to pay $150 to the clerk of this court for the benefit of the appellant for these purposes, within thirty days after the filing of this opinion, and giving her the possession of the family home and $20 per week ali-

mony for the benefit of herself and minor children, *pendente lite*. In this and all other cases, in the absence of a controlling equity, such allowances will be charged to the wife in the division of the property in case a divorce is granted.

Crow, Parker, Chadwick, and Morris, JJ., concur.

On Rehearing.

[*En Banc.* December 21, 1912.]

Fullerton, J.—After the opinion of November 12, 1912, in this cause directing that the appellant be awarded alimony, suit money, and attorney's fees, had been filed, a petition for rehearing was presented by the respondent in which the jurisdiction of the court to make the order was suggested. On consultation upon the petition, it was found that differences of opinion existed among the several members of the court as to the court's jurisdiction, and the cause was set down for further argument at the present session. The question was reargued at the time appointed, and the court is now convinced that it was in error in making the order directed in its former opinion, and in error in making the orders in the cases of *Holcomb v. Holcomb*, 49 Wash. 498, 95 Pac. 1091; *Sullivan v. Sullivan*, 49 Wash. 508, 95 Pac. 1095; *Gallagher v. Gallagher*, 65 Wash. 310, 118 Pac. 4; and in entertaining the petition in *Gust v. Gust*, 69 Wash. 220, 124 Pac. 504. The reasons which lead us to this conclusion are clearly and fully stated in the dissenting opinion written by the present chief justice in the case of *Holcomb v. Holcomb*, *supra*, and we adopt the opinion as the opinion of the court in the present case. The order heretofore entered herein, directing alimony, suit money, and attorney's fees to be granted is therefore revoked, and the application for the same denied.

Mount, C. J., Chadwick, Morris, Parker, Ellis, and Main, JJ., concur.

Gose, J. (dissenting)—I adhere to the view expressed in the majority opinion in *Holcomb v. Holcomb*, *supra*.

[No. 10701. Department One. November 12, 1912.]

JESSIE M. BEDOLFE, *Appellant*, v. ROBERT D. BEDOLFE, *Respondent*.[1]

VENUE — CHANGE—BIAS OF JUDGE—TIME. An application for change of venue on account of the bias of the judge, made in a proceeding to modify a decree of divorce respecting the custody of a child, is in time if made at the first appearance of the respondent in such proceeding.

VENUE—CHANGE—BIAS OF JUDGE—SCOPE OF ACT. Laws 1911, p. 617, authorizing a change of venue on account of the bias of the judge applies to a proceeding to modify a decree of divorce respecting the custody of a child.

DIVORCE—DECREE—CUSTODY OF CHILD—OPERATION AND EFFECT. Where a decree of divorce awarded the custody of one child to the wife and of one child to the husband, with the right to both parties to visit the children, and after the husband had sent his child outside of the state to its paternal grandparents, the court denied an application to modify the decree, but confirmed it, the original decree will not be interpreted as requiring that the child be kept within the jurisdiction of the court.

DIVORCE—CUSTODY OF CHILD—RIGHT OF VISITATION—MODIFICATION OF DECREE. Where the wife is denied the right to visit the child as provided in the decree, by reason of the hostility of the paternal grandparents having custody of the child, she may apply to the court of first instance for a modification of the decree or for a rule against the defendant for contempt; but the right to visit a child is not absolute and must yield to the welfare of the child.

Appeal from an order of the superior court for Pierce county, Easterday, J., entered May 25, 1912, upon findings in favor of the defendant, refusing to modify decree of divorce. Affirmed.

Myron C. Cramer and *M. J. Gordon*, for appellant.

Hayden & Langhorne, for respondent.

GOSE, J.—This is an application for the modification of the decree entered in a divorce action between the appellant and the respondent. The appellant sought to modify the

[1]Reported in 127 Pac. 594.

decree so that it would expressly provide that the minor child, whose custody was awarded to the respondent, should not be taken out of the jurisdiction of the court of first instance. The court refused the modification, and refused to require respondent to return the child to its jurisdiction. This appeal resulted.

The petition was filed in the court wherein the original decree was granted. Upon the application of the respondent, conformably to the statute (Laws 1911, page 617), the proceeding was transferred to another department of the same court. The appellant's first contention is that the application was not timely. So far as the record discloses, it was made upon the first appearance of the respondent in the proceeding. This suffices.

It is next argued that an application for the modification of a decree in a divorce action is a continuation of the original case, and hence that the statute does not apply. We think the premise is sound, but that the conclusion does not follow. The statute in positive terms provides that no judge of a superior court "shall sit to hear or try any action or proceeding" when his prejudice shall have been established in the manner therein provided. The right to a change of judges is purely statutory, and does not exist except in those instances where the statute gives it. This rule is recognized in the authorities cited by the appellant. This is a proceeding in the original action. The original decree was entered on the 8th day of May, 1911. The petition in this proceeding was filed in February, 1912. After the original case had gone to final judgment, the statute became applicable to any subsequent proceeding in the original case. Our lawmakers, in recognition of the fact that it was just as essential for a litigant to feel that he had had a fair trial as it was that he should have a fair trial in fact, enacted the law.

The original decree, after awarding the custody of the younger of the two children to the appellant, provided:

"Ordered, adjudged and decreed that the defendant have the care, custody and control of the minor child, Florence Rowena Bedolfe; and it is further ordered, adjudged and decreed that each party hereto shall have the right to visit the respective child awarded to the other at all reasonable times during reasonable hours of the day."

At the time of the entry of the decree, both the appellant and respondent resided, and now reside, in the city of Tacoma. The respondent placed the child with her maternal grandmother until some time in January, 1912, when he took her to his parents at North Fork, in the state of Oregon. On December 11, 1911, about seven months after the entry of the decree of divorce, the appellant remarried. The order in this proceeding contains the following language:

"Ordered, adjudged and decreed that the said application be and the same is hereby denied, and that said decree heretofore rendered herein on the 8th day of May, 1912, be and the same is hereby confirmed, and the said decree does hereby stand as originally entered."

The appellant argues that the original decree fairly implies that the child should be kept within the jurisdiction of the court that entered the decree. It may be susceptible of that interpretation. It is apparent, however, that the trial court did not so interpret it, and that its intention was that the child should remain with the paternal grandparents and without the state.

The evidence shows that, at the time of the trial, North Fork, Oregon, where the child was kept, was accessible only by traveling upon the caboose of a work train or by wagon road. It further shows that the child is being well cared for, and that her welfare does not demand that she be returned to the jurisdiction of the trial court. The appellant visited the child some time in February. The respondent's father at that time disclosed a marked hostility to her. From this fact it is argued that the spirit of the decree permitting her to visit her daughter would be defeated if the child is not

taken from her paternal grandparents. The privilege of visitation of the parent is an important one, but it is not an absolute right, nor is it the paramount consideration; it must yield to the good of the child, which is in the last analysis the controlling consideration. The respondent has no relatives in the city of Tacoma, and we think the learned trial court rightly concluded that the child's welfare would not be promoted by returning her to her maternal grandmother. We deem it proper, however, to say that the decree gives the appellant the right to visit the child, and that this right cannot be denied her by placing the child where appellant will be met by insulting epithets when in the exercise thereof. It is not necessary to repeat the shocking language which the respondent's father applied to the appellant. If he or any member of his household in the future treats her with such incivility, when she is visiting her daughter, as to deter her from continuing her visits, she may again apply to the court of first instance for a modification of the decree, or for a rule on the respondent to show cause why he should not be punished as for a contempt.

The order is affirmed.

Mount, C. J., Crow, Parker, and Chadwick, JJ., concur.

[No. 10151. Department One. November 12, 1912.]

LOUIS H. MELIUS, *Respondent*, v. CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—SAFE APPLIANCES—COMMON USE—QUESTION FOR JURY. Although the preponderance of the evidence shows that a "pin-and-ring" coupling is a safe and standard safety appliance for the equipment of railroad dump cars, where there was evidence that the nose or outward curve at the point of the pin did not insure the proper degree of safety and that the pins on the particular car were shorter than they should have been, and that a sudden tightening of the chain would have a tendency to throw the point out; the question should be submitted to the jury, even if it was not probable that the two chains could become uncoupled at the same time and from the same cause.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Prejudicial error may not be predicated on instructions that do not fit the facts of the particular case where other proper instructions were given so that the law of the case was before the jury.

MASTER AND SERVANT—INJURY TO SERVANT—METHOD OF WORK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. An experienced brakeman on ordinary trains is not guilty of contributory negligence, as a matter of law, when working on a dirt train, in following the direction of the conductor to turn on the air by means of an angle cock at the side of the car, instead of going to one at the end of the car, where he had no reason to apprehend danger.

SAME—FELLOW SERVANTS—CONDUCTOR AND BRAKEMAN. A conductor of a dirt train engaged in remedying a defect in a dump car is not a fellow servant of a brakeman, assisting him and working under his direction, but is a vice principal.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. A cause will not be reversed for the giving of instructions requested by both sides, hostile in theory and confusing, where the jury was not misled, although the court should have adopted a theory of its own, or given the instructions requested by one side only.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered October 23, 1911, upon the verdict of a jury rendered in favor of the plaintiff, for per-

[1]Reported in 127 Pac. 575.

sonal injuries sustained by a brakeman employed on a work train. Affirmed.

George W. Korte and *H. S. Griggs*, for appellant.

Johnston & McMenamin, for respondent.

CHADWICK, J.—Plaintiff, an experienced brakeman, was employed by the defendant on a dirt train. The train was made up of an engine and forty cars of a type known as the Western Air Dump car. At the time of the accident, to which we shall presently refer, the crew, consisting of a conductor, two brakemen, and the enginemen, were filling a trestle. The train had been hauled from where the steam shovel was operating to the trestle, and the loads had been dumped. The dumping was accomplished through the instrumentality of compressed air operated from the engine. The cars were equipped with eight chains, four on either side. Two of the chains were used to pull the bed of the car back to its normal position after being dumped; and two, one of which was near each end of the car, were used to hold the car in its position when loaded or after it was unloaded. These chains, which we shall call stay chains, were fastened, one end to the trucks and the other end to the body or bed of the car. They were broken in the center so they could be coupled or uncoupled as occasion required. The coupling was the old-fashioned hook and ring, called by some of the witnesses a "toggle"; it being in all essential particulars the same as the rough lock chain which was in common use in the early days when heavy freighting was done by teams, the hook on one end of the chain having sufficient spread to hold the link on the end of the other. The tongue of the hook folded back on the link to which it was attached, the link being hammered down to two parallel bars against which the tongue was placed, and over all the ring was slipped so that it was held fast, not only by the law of gravity, but by friction as well. When the car was to be dumped, the ring was knocked off

the hook or lip, allowing the hook to drop or unfold, thus separating or opening the chain. A car is dumped on the side opposite the broken chains, no account being taken of the chains on what may be called the down side of the car.

On one of the cars, No. X1057, it seems that the mechanism through which the air was applied had become deranged, so that the car could not be righted from the engine. The train was then moved from the trestle, the bed of the car being in an oblique position. When upon solid ground, the crew, under direction of the engineer, undertook to remedy the defect. It was found that the piston had slipped out of the sleeve of the cylinder, the cylinder being a part of the air equipment on each car. The conductor obtained a block to hold the cylinder in position, intending to throw the piston back in its place by the application of the air. This he instructed plaintiff to turn on. There were two ways to do this, one by operating an angle cock at the end of the car where there would have been no danger, and one by manipulating an angle cock on the up side of the car. The conductor blocked the piston head and plaintiff turned on the air as directed. The car righted itself but, instead of stopping when the bed had resumed a horizontal position, it went on over, catching plaintiff and inflicting the injuries of which he now complains. The car tripped because the stay chains on the then down side of the car became unlocked, and being already loose on the up side of the car, there was nothing to stay it in position. While possibly more pertinent to our subsequent discussion, for the sake of keeping the facts together and in mind, it may be said, that the conductor testified that the chains were in place and fastened before he undertook to right the car, that he kicked a hole in the snow underneath each chain so that they would hang vertically.

It is the theory of the plaintiff that, because the pin coupling was curved in at the point, rather than out, as he says it should have been, the sudden uprighting of the car

tended to throw the rings off the chains. The defendant's theory is that, inasmuch as the car had been hauled a considerable distance with the stay chains on the down side loose and dragging, they had become unfastened and were loose at the time the attempt was made to right the car. The law of gravity and certain principles of natural philosophy are referred to and relied upon. The negligence of the defendant is alleged to be in this, that standard and safe equipment had been taken off the car and unsafe and improper hooks and rings had been substituted; that is to say, the hooks on car X1057 inclined inward and tapered at the point, so that the ring would have a tendency to slip off if weight or sudden strain were put upon the chain. Besides the general denials, defendant pleaded assumed risk, that plaintiff was a fellow servant with the conductor, and contributory negligence. From a judgment in favor of the plaintiff, defendant has appealed.

The first error assigned, and this comprehends about all of the questions raised by appellant, is that the court erred in overruling defendant's motion for a directed verdict. The gist of this motion is that the evidence is undisputed that the coupling with the hook and ring described in the complaint was of standard construction and make, and in common use, and is in fact the only practical appliance. We think that it is shown by a very clear preponderance of the evidence that the pin-and-ring coupling is a safe and standard appliance, and is more practical than the one which respondent insists should have been used. This is described as a plate or locking attachment.

"It slips down over the two guys at the sides of the link. There are two holes opposite each other and one on the point that slips over the point of the finger. It drops down over the point and also holds the hook when it is up in place. To then unlock it, you must slip it up and the point drops down."

But these are questions of fact to be decided by the jury, and there was testimony from which it might have found that

the pin-and-ring coupling was not a proper or safe appliance; or, if so, whether a nose or outward curve at the point of the pin was necessary to insure the proper degree of safety, and also whether the pins on the particular car were shorter than they should have been. There was much evidence to show that a nose or outward bend on the hook would tend to lessen the efficiency of the appliance and increase the danger of its breaking, but this conflict or question is sufficient to sustain the verdict upon general grounds and, although appellant's cars were equipped generally with proper couplings, the jury has said, considering the evidence in this case, that the ones on car No. X1057 did not comply with the standard set by the witnesses for the appellant.

Nor can we hold to the theory of physical impossibility. It would seem that this might be so and yet, by reason of the alleged inward slant—there was at least one witness who said that the hooks on these chains were somewhat shorter than they were on other cars—it may be that the sudden tightening of the chain would tend to throw the point out. This might have caused the ring to slip beyond the point of contact. It is further urged that, although it be admitted that one of these chains might have been so deficient that the ring would slip off while it was in an upright position, it would be practically impossible for the two chains to break at the same time. There is evidence to show that the holding of any particular chain depends entirely upon the size of the ring and the shape of the hook. Two witnesses so testified. We cannot say as a matter of law that it was impossible for the two chains to become uncoupled at the same time and from the same cause. The question was for the jury.

Complaint is made that certain instructions do not state the law. We think that this may be admitted in this respect, that they do not fit the facts of this particular case. Some of them seem to be drawn on the theory that the instrumentality alleged to be deficient was under the immediate charge and direction of the plaintiff, and to some extent at least do

not state the rule as we understand it to be. But under several decisions rendered by this court within the past few years, we feel that we would not be warranted in holding that the defendant was thereby prejudiced, inasmuch as other and proper instructions were given, so that the law of the case was before the jury.

It is also complained that plaintiff is guilty of contributory negligence. While plaintiff was an experienced brakeman upon ordinary trains, his acquaintance with these dump cars was slight, and to hold that he was guilty of contributory negligence because he followed the direction of the conductor and turned on the air by means of the angle cock on the side of the car, instead of going to the end of the car and using the angle cock there situated, would, we think, be carrying the rule too far. Plaintiff had no reason to apprehend danger. The jury must have believed his testimony and the testimony of the conductor when they said that the chains on the down side of the car were in position, and if the instrumentality had been perfect or reasonably so, the accident would not have happened.

The conductor was not the fellow servant of plaintiff. He had charge and direction of the work in hand. He was in authority. This fact distinguishes this case from *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 487, 102 Pac. 405, and kindred cases. It falls rather under the rule stated in *Martin v. Hill*, 66 Wash. 433, 119 Pac. 849. Respondent and the conductor were not acting together, that is, upon equal terms. The one was there to do the bidding of the other. The character of the work required direction, and the conductor stood in the place of the master.

It is complained that the trial judge gave inconsistent instructions; that both plaintiff and defendant requested instructions hostile in theory, and by giving them, confusion rather than direction was put upon the jury. What we have already said indicates our purpose to affirm this case, for we are unable to say, in the light of the facts, that the jury

was misled. But we have said before and now desire to say, that all cases should be tried on a certain theory; that whatever theory may be entertained by counsel, the court is the guiding and directing genius of the trial, and out of the conflict of opinion should adopt a theory of its own. It is proper for counsel to request instructions, but instructions when requested by both sides should not be given when they cover the same point. If it be so, the instructions are unnecessarily drawn out, tend to confusion, or become meaningless because of constant repetition. As a rule, the law of a case can be covered by very few instructions and we would suggest that, if requested instructions are to be adopted by the court, those requested by the one side or the other be rejected.

The record is faulty in the respect complained of, but we are unwilling, considering the facts of the particular case and the probability of a like verdict upon retrial, to order a reversal. Affirmed.

GOSE, CROW, and PARKER, JJ., concur.

[No. 10389. Department One. November 14, 1912.]

CAMPBELL LUMBER COMPANY, *Respondent*, v. DEEP RIVER LOGGING COMPANY *et al.*, *Appellants*.[1]

DEEDS—RESERVATIONS—CONSTRUCTION. Where a grantor of the northeast quarter of a section reserved the right to itself and assigns to pass over the lands for hauling timber products and transporting logs and timber, and at the time the deed was made, it also owned the northwest quarter of the section, from which it had sold the timber with right of removal within five years, the intent of the reservation was to preserve its right to remove its timber from the northwest quarter, and was for the benefit of the purchaser of the timber, to whom the right reserved could be assigned.

Appeal from a judgment of the superior court for Pacific county, Sol Smith, J., entered April 5, 1912, upon findings

[1]Reported in 127 Pac. 566.

in favor of the plaintiff, after a trial on the merits before the court, in an action to enjoin a trespass. Reversed.

E. E. Coovert (*B. S. Grosscup* and *W. C. Morrow*, of counsel), for appellants.

Kollock & Zollinger and *J. Bruce Polwarth*, for respondent.

Crow, J.—On July 31, 1909, the Weyerhaeuser Timber Company, a corporation, then the owner of the north half of section 37, township 11, north, of range 8, west of the Willamette Meridian, in Pacific county, for a consideration of $18,000, sold and conveyed to the defendant Pacific Logging Company, a corporation, all timber on the northwest quarter, with the right to remove the same within five years. On September 12, 1910, the Weyerhaeuser Timber Company, as party of the first part, sold, and by warranty deed conveyed, to the plaintiff, Campbell Lumber Company, a corporation, as party of the second part, the northeast quarter of the section. The deed contained the following clause:

"The first party also expressly reserves and excepts unto itself, its successors and assigns, forever, the right at all reasonable times to freely pass and repass over said land or any part thereof, with persons, team, railway tracks, or in any other manner usual or customary in hauling or delivering timber, or timber products, so that the first party, its successors or assigns, shall always have the full right to transport logs, timber, or timber products, over said land in the usual and customary way."

Early in July, 1911, the defendant Pacific Logging Company, and the defendant Deep River Logging Company, a corporation, for the purpose of removing the timber from the northwest quarter, caused a logging road eight feet in width to be constructed, which for a distance of 300 feet crossed the northwest portion of the northeast quarter of the section owned by the plaintiff, Campbell Lumber Com-

pany. This railroad was constructed without plaintiff's permission or consent and against its protest. On August 7, 1911, the Weyerhaeuser Timber Company executed and delivered to the defendant Pacific Logging Company the following written instrument, which was duly acknowledged:

"Whereas the Weyerhaeuser Timber Company, a corporation of the state of Washington, having sold to the Campbell Lumber Company and conveyed to them by deed dated September 12, 1910, the NE quarter of sec. 35, township 11, north, of range 8, west of the Willamette Meridian, and reserved in said deed the following exception and reservation, to wit:

"The first party also expressly reserves and excepts to itself, the successors and assigns, forever, the right at all times to freely pass and repass over said land or any part thereof with persons, teams, or railway tracks, or in any other manner usual or customary, in hauling or delivering timber, or timber products, so that the first party, its successors or assigns, shall always have the full right to transport logs, timber, or timber products over said land in the usual and customary way.

"Now therefore for and in consideration of one ($1) dollar to it paid by the Deep River Logging Company, a corporation of Oregon, hereby grants, bargains, sells, ratifies and confirms to the said Deep River Logging Company, and to its successors and assigns, the right to pass and repass with persons, teams, railway tracks and transport logs, timber and timber products over the same, in the usual manner over and across the NE corner of sec. 35, township 11, north, of range 8, west of the Willamette Meridian, for the purpose of hauling and transporting saw logs taken from the NW quarter of sec. 35, and sec. 34, all in township eleven, north of range 8, west of the Willamette Meridian until such timber and logs are all removed; said rights hereby granted being excepted and reserved in that certain deed made by the said Weyerhaeuser Timber Company to the Campbell Lumber Company, of date September 12, 1910, hereby ratifying and confirming the said right and privilege heretofore given to said Deep River Logging Company."

This action was commenced by the plaintiff, Campbell Logging Company, against the Deep River Logging Com-

pany and Pacific Logging Company, to enjoin them from trespassing upon the northeast quarter, and from operating the logging railroad thereon. From a decree in plaintiff's favor, the defendants have appealed.

The appellant Deep River Logging Company constructed and operated the railroad at the instance of appellant Pacific Logging Company, to aid it in removing timber from the northwest quarter, and on the trial it was conceded that the Deep River Logging Company has no vital interest in this action, the real contest being waged between appellant Pacific Logging Company and respondent, Campbell Lumber Company.

Appellants contend that the reservation or exception in the deed for the northeast quarter, from the Weyerhaeuser Timber Company to respondent, is an easement appurtenant to the northwest quarter, the dominant estate; while respondent contends that it is not an exception or easement but a reservation in gross, personal to the Weyerhaeuser Timber Company, which cannot be assigned to or enjoyed by the Pacific Logging Company. On the facts presented, it seems to us that it is not necessary to determine whether the clause is an exception, reservation or easement. The Weyerhaeuser Timber Company retained title to the northwest quarter when it sold the timber to the appellant Pacific Logging Company. It is to be presumed that in so doing it desired the removal of the timber within the stipulated period of five years. To facilitate such a removal, it afterwards made the reservation contained in its deed to respondent. The intention of the parties should be ascertained from the instruments, and when ascertained should be enforced. In the recent case of *Delano v. Luedinghaus*, 70 Wash. 573, 127 Pac. 197, this court said:

"Much of the briefs is taken up with the discussion of the difference between an exception and a reservation. We shall not review the cases cited by either side, nor go into the primary definitions of these terms. They were defined in *Biles*

v. Tacoma, Olympia & Grays Harbor R. Co., 5 Wash. 509, 32 Pac. 211. The court there said, and justly so, considering the authorities, that 'While it is true that there is a technical legal distinction between an exception and a reservation, it is also true that whether a particular clause in a deed will be considered an exception or a reservation depends not so much upon the words used as upon the nature of the right or thing excepted or reserved.' In each case the equities of all the parties must be considered in arriving at the intent of the deed. . . . Reservations and exceptions are almost invariably made for the benefit of the grantor, and when so made, courts will not resort to technical rules to defeat or limit them."

The intention sought to be expressed in the deed from Weyerhaeuser Timber Company to respondent is so manifest that it cannot be misunderstood. The Weyerhaeuser Timber Company then held, and still holds, title to the northwest quarter of the section, from which it had sold the timber to appellant, the same to be removed within five years. The Weyerhaeuser Timber Company made the reservation or exception in its deed to respondent so that it or its assigns might remove timber from the northwest quarter as well as other lands which it then owned. Appellant was removing the timber as assignee of the Weyerhaeuser Timber Company, and was entitled to the benefit of the reservation or exception in the deed to respondent. Other facts presented disclose equities in favor of appellant, but they need not be here stated, as we hold that appellant Pacific Logging Company had the right to construct and use the logging road across the northeast quarter.

The judgment is reversed, and the cause remanded with instructions to dismiss.

Mount, C. J., Parker, Chadwick, and Gose, JJ., concur.

[No. 10552. Department Two. November 14, 1912.]

SARAH A. GUST, *Appellant*, v. ADOLPH A. GUST, *Respondent*, PAULINE MILLER, *Intervener*.[1]

APPEAL—EFFECT OF TRANSFER—PROCEEDINGS IN LOWER COURT—JURISDICTION—MODIFICATION OF DIVORCE. Under Rem. & Bal. Code, § 1731, which provides that, on appeal, the whole cause shall be brought to the supreme court and that the superior court shall have jurisdiction only to perfect the appeal, the trial court has no jurisdiction to modify a decree of divorce after appeal taken.

Appeal from an order of the superior court for King county, Myers, J., entered May 10, 1912, modifying a judgment pending appeal, after a hearing before the court. Reversed.

Edward Judd and *B. E. McGregor*, for appellant.

H. E. Foster, for respondent.

FULLERTON, J.—This is an appeal from an order of the trial court modifying a judgment after an appeal had been taken and perfected in this court from the judgment modified. From the record it appears that the action in which the original judgment was entered was an action for a divorce, in which a third party had been allowed to intervene as claimant of an interest in the property sought to be partitioned between the parties to the divorce proceedings. The divorce proceedings were tried out on their merits, and resulted in a judgment dismissing the intervener's complaint, and determining the issues between the plaintiff and defendant in favor of the defendant, a formal judgment to that effect being entered on May 6, 1912. Immediately on entering the judgment, the plaintiff gave notice of appeal therefrom in open court to this court, perfecting the appeal on the same day by executing and filing an appeal bond as required by statute. After the appeal had been thus per-

[1]Reported in 127 Pac. 566.

fected, the intervener conceived that the written entry embodying the formal judgment did not express the actual judgment rendered by the court, and made application to the court for its modification. Due notice of the application was given the plaintiff, and a hearing had thereon, at which hearing the court modified the judgment in accordance with the request made in the application. This appeal is from the order of modification.

The order must be reversed. In virtue of the statute, actions for divorce, whether granted or denied in the court below, are tried *de novo* in this court on appeal of the unsuccessful party. An appeal, therefore, duly perfected, brings the whole case to this court for review, and deprives the trial court of jurisdiction to take any further action in the proceeding, except such as may be specially provided for in the act relating to appeals. Rem. & Bal. Code, § 1731. The modification of the judgment here complained of was not such an action as the statute authorizes. It virtually changed the rights of the parties to the judgment, and was, in effect, the entry of a new judgment, while the statute authorizes only such further action on the part of the trial court after an appeal has been taken as may be necessary to perfect the record in this court. These principles have been repeatedly announced by former decisions of this court. *State ex rel. Mullen v. Superior Court*, 15 Wash. 376, 46 Pac. 402; *Canada Settlers' Loan & Trust Co. v. Murray*, 20 Wash. 656, 56 Pac. 368; *Irving v. Irving*, 26 Wash. 122, 66 Pac. 123; *Aetna Ins. Co. v. Thompson*, 34 Wash. 610, 76 Pac. 105.

The order appealed from is reversed, and the cause remanded with instructions to the lower court to vacate the same and dismiss the application.

MOUNT, C. J., ELLIS, MORRIS, and MAIN, JJ., concur.

[No. 10637. Department Two. November 14, 1912.]

WILLIAM R. CRAWFORD, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

APPEAL—REVIEW—CESSATION OF CONTROVERSY. Objection to the jurisdiction of a state court to appoint a receiver for an insolvent railroad company, on the ground that the Federal court has appointed receivers for it, will not be considered on appeal, where pending the appeal, the Federal court recognized the prior assumption of jurisdiction by the state court, and for that reason alone had discharged its receivers and dismissed the bill.

Appeal from an order of the superior court for King county, Frater, J., entered May 8, 1912, appointing a receiver, after a hearing before the court. Affirmed.

Kerr & McCord, for appellant.

Morris B. Sachs, for respondent.

PER CURIAM.—This is an appeal from an order appointing a receiver. The respondent, as a stockholder of the appellant railway company, began an action in the superior court of King county against the railway company, and certain other defendants as trustees, in which he sought relief against certain acts of the trustees which he alleged to be in fraud of his rights as a stockholder, asking that a receiver be appointed for the defendant railway company. On the filing of the complaint, a temporary receiver was appointed by the court, but was afterwards discharged on motion of the defendants. After the discharge of the receiver, a bill of complaint was filed in the district court of the United States for the western district of Washington, in which the trustees named as defendants in the action in the state court were plaintiffs and the railway company was defendant, setting forth that the railway company was insolvent, and asking that its affairs be wound up and its assets

[1]Reported in 127 Pac. 594.

be distributed among its creditors, asking also for the appointment of a receiver. The railway company appeared and admitted its insolvency, and receivers were duly appointed. Subsequently the state court, on the renewal of the application for a receiver made in that court, granted the application and appointed a receiver. This appeal is from the last mentioned order.

The appeal is based solely on the ground that the state court was without jurisdiction to act in the premises, since the Federal court had assumed jurisdiction over the railway company and appointed receivers which were prior in time to those appointed by the state court. Since the appeal was taken, however, it has been shown by a supplemental transcript that the Federal court has recognized the prior assumption of jurisdiction over the railway company by the state court and has, for that reason alone, discharged its own receivers and dismissed the bill of complaint on which the appointment of the receivers was founded. The action of the Federal court recognizing the prior jurisdiction of the state court precludes the necessity of any inquiry on our part as to the jurisdiction of the state court to act in the premises, and since no other objection than want of jurisdiction in the state court to act has been urged against the appointment of the receiver by that court, its order must stand affirmed.

[No. 10476. Department Two. November 15, 1912.]

C. M. Hatcher, *Respondent*, v. Sovereign Fire Assurance Company of Canada, *Appellant*.[1]

Insurance—Fire Insurance—Proofs of Loss—Waiver. The requirement that proofs of loss be furnished within sixty days after the fire, may be waived, although the conduct of the insurer constituting the waiver occurred subsequent to the time fixed in the policy for the proofs to be furnished.

Same—Proofs of Loss—Waiver. Proofs of loss are waived where, in answer to the direct question whether any formal proofs of loss were wanted or would be waived, the agent answered in the affirmative and stated that they would waive formal proofs of loss.

Same—Proofs of Loss—Waiver. The express waiver of formal proofs of loss is not affected by a stipulation that any action taken in investigating the fire and ascertaining the amount of damages shall not waive or invalidate any of the conditions of the policy or any rights of the parties; as the company could waive any right it had under the stipulation; and because the waiver is not inferred from any action in the investigation, etc.

Appeal—Preservation of Grounds—Objections to Pleadings and Evidence. The relevancy of evidence of a waiver of proofs of loss after the expiration of the time fixed in the policy, under pleadings raising an issue as to waiver before the expiration, not having been raised at the trial, except by objection that it was "immaterial," cannot be first made on appeal, counsel not having suggested surprise on account of the admission of the testimony.

Appeal from a judgment of the superior court for King county, Main, J., entered January 6, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a fire insurance policy. Affirmed.

Granger & Clarke, for appellant.

Kerr & McCord, for respondent.

Morris, J.—Action upon a fire insurance policy, and appeal from judgment awarding recovery.

[1]Reported in 127 Pac. 588.

It will not be necessary to state the facts, except in so far as they bear upon the questions of law submitted by the appeal. The policy provided that proofs of loss should be furnished within sixty days after the loss occurred. It is admitted, while there was some attempt to comply with this requirement, that formal proofs of loss were not furnished within the sixty days, and respondent's recovery must depend upon his contention that this requirement may be, and was, waived after the expiration of the sixty days. As we view it, all of the errors suggested go to this one point, and they can well be discussed under one head.

It must be admitted that there is some conflict of opinion upon this question. While it is uniformly held that this requirement is a valid one, and can only be defeated by a waiver, the conflict arises as to when this waiver may be made in order to bind the insurer. It will not be necessary to discuss these conflicting authorities, since the only thing of value in this opinion is to indicate which doctrine this court will follow. After due consideration, we have decided to unite with those courts which hold that the waiver will be effectual although the act or conduct of the insurer relied upon to constitute such waiver is subsequent to the time fixed by the policy within which proofs of loss must be furnished. We cannot understand why, when the insurer, with full knowledge of the terms of its policy, knowing that, under a strict construction of its terms, the insured by his failure to comply with those terms has breached the condition of his recovery, it may not waive such breach; and when it so acts as to lead the insured to believe that he has not lost his rights under the policy, but that it is still in full force and binding upon the insurer, may not be held to as strict accountability as when the waiver takes place before the time fixed in the policy in which to furnish proofs of loss expires. Such a requirement as to time is nothing more than a condition involving forfeiture of a substantial right, and the application of the doctrine of waiver should be as effectual after the time

as before. Since the only question is whether the strict observance of a contractual right will be insisted on, we can see no reason why such a strict observance may not be waived in this case as in many others that might be cited, irrespective of the time of such waiver. There could be no question in this case of the sufficiency of the evidence to establish the waiver. The question was asked of appellant's agent: "Mr. Roberts, do you want any formal proofs of loss, or is this sufficient? Will you waive the proofs of loss?" To which, it is testified, reply was made: "Certainly, we are not technical . . . We will waive the formal proofs of loss." The following cases are among those supporting the rule we have adopted: *Prentice v. Knickerbocker Life Ins. Co.*, 77 N. Y. 483, 33 Am. Rep. 651; *Equitable Life Assur. Soc. v. Winning*, 58 Fed. 541; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 240; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. Rep. 323; *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673; *Dobson v. Hartford Fire Ins. Co.*, 86 App. Div. 115, 83 N. Y. Supp. 456; *United Firemen's Ins. Co. v. Kukral*, 4 Ohio Cir. Dec. 633; *Johnson v. Dakota Fire & Marine Ins. Co.*, 1 N. D. 167, 45 N. W. 799; *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 South. 355.

Respondent contends that, under an agreement entered into between the parties on May 11, 1910, appellant cannot now claim the benefit of any subsequent waiver. This agreement is as follows:

"It is hereby stipulated and agreed by and between C. M. Hatcher, party of the first part, and the Imperial Underwriters of Canada (The Sovereign Fire Assurance Company of Canada) and other companies signing this agreement, party of the second part, that any action taken by said party of the second part in investigating the cause of fire or investigating and ascertaining the amount of loss and damage to the property of the party of the first part caused by fire alleged to have occurred on the 6th day of May, 1910, shall not waive or invalidate any of the conditions of the policy of

the party of the second part held by the party of the first part, and shall not waive or invalidate any right whatever of either of the parties to this agreement.

"The intention of this agreement is to preserve the rights of all parties hereto and provide for an investigation of the fire and the determination of the amount of the loss or damage in order that the party of the first part shall not be delayed unnecessarily in his business, and in order that the amount of his claim may be ascertained and determined without regard to the liability of the party of the second part.

"Witness our hands and seals in duplicate this 11th day of May, 1910. C. M. Hatcher,

"J. T. Anderson, for the Imperial Underwriters of Canada, The Sovereign Assurance Company of Canada."

We cannot so hold. This agreement was made for the benefit of the company, and it could, if it so desired, waive any right it had obtained thereunder. To hold otherwise is to say one cannot waive the stipulations of a contract, nor depart from a right he has once obtained. Such is not the law. Besides, this waiver is not inferred from "any action taken . . . in investigating the cause of the fire or investigating and ascertaining the amount of loss." It rests, if at all, upon the direct statement, "We will waive the formal proofs of loss," and not upon any act or circumstance which might be interpreted by the jury as indicating an intention to waive. In other words, by this agreement the company insisted that its subsequent acts should not be subject to the interpretation of any one except itself, and that it and it alone should have the right to say what it would and what it would not do in insisting upon any stipulation in the policy; and having thereafter expressly waived, it cannot now insist that this agreement makes such waiver valueless.

It is also insisted that we have held in *Deer Trail Consol. Min. Co. v. Maryland Casualty Co.*, 36 Wash. 46, 78 Pac. 135, 67 L. R. A. 275, that there can be no waiver after the time

fixed in the policy for furnishing proofs of loss has expired. We do not so read that opinion. We there held that "immediate notice" meant notice within a reasonable time, and that eight months was not a reasonable time, and that a statement made on January 21, eight months after an accident, that "we could make out proof of the accident" on the 28th or 29th of January, to which reply was made "Very well; that will be soon enough," was insufficient to show a waiver; that it could mean nothing more than that proof on "the 28th or 29th would do as well then as at the date of the conversation, which was on January 22d," and that, if the proof of loss had been made out and submitted on January 22d, its receipt by the casualty company would not be held to be a waiver of its right to defend against the policy, because notice was not given within a reasonable time. The court does not there say there could be no waiver after the time fixed, which it construes to be a reasonable time; but that the reply of the agent, "Very well; that will be soon enough," could not be held to be a waiver. The further language of the court, "It was too late on January 22d to give the notice, the respondents were then in default," cannot be held to mean that the casualty company could not waive the default, but only that it did not waive it, nor extend the rights of the mining company beyond what they were on January 22d.

There is also some contention that the pleadings only raise an issue of waiver before the expiration of the sixty days, and not subsequent thereto. The relevancy of this evidence was not questioned at the trial. It was objected to as "immaterial," meaning, as we take it, to raise the same question as is here raised, that there could be no waiver after the sixty days had expired, a question of law rather than one of pleading. We do not think that counsel, having failed to suggest any question of issue, or surprise, or unpreparedness to proceed on account of the admission of this testimony, should now be permitted to insist upon a technical reading of the

complaint, not insisted upon nor called in question upon the trial.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and ELLIS, JJ., concur.

MAIN, J., took no part.

[No. 10738. Department Two. November 15, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Weyerhaeuser Timber Company, Plaintiff*, v. THE SUPERIOR COURT FOR SNOHOMISH COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN—PROCEEDINGS—PREREQUISITE—ADOPTION OF PLAN OR LOCATION. Under Rem. & Bal. Code, § 925, making the question of public necessity in condemnation proceedings a question for the court to finally decide, a formal resolution by the corporation adopting the particular plan or location prayed for in the petition, is not essential, either to pleading or proof, as a prerequisite to an adjudication of public use, where the contest is between the relator and the landowner, and there is no question of priority between rival companies making time material; the filing of the petition being sufficient as against the landowner.

SAME. The prosecution of condemnation proceedings for certain lands, instituted by an authorized attorney of the petitioner, is a ratification of the proceeding, and estops the petitioner from claiming that the action was unauthorized.

EMINENT DOMAIN—PUBLIC USE—POWER PLANT—ELECTRIC LIGHT—PRIVATE AND PUBLIC PURPOSES. A condemnation for an electric power plant is for a public use, where the only present market for the power and the only present purpose was to furnish electric light for a town and its inhabitants; and it is immaterial that the petitioner was also authorized by its articles to sell power for all purposes, public and private; since these uses are separable.

SAME—PUBLIC USE—NECESSITY. Condemnation for an 80 horse power plant, to furnish electric light to a town that has present need for only 30 horse power, is not excessive, in view of the probable growth of the town, where there is no intention to use the

[1]Reported in 127 Pac. 591.

power for other than public use, except in such small quantities as to be insignificant and incidental to the main public purpose.

SAME—PUBLIC NECESSITY—PRESUMPTIONS—EVIDENCE. In condemnation for an electric light plant by a company having a franchise and under agreement to furnish a town with electric light, it will be presumed that the enterprise is in the interest of the public, and evidence that the plan is wasteful and that another plan would develop greater power from the same source does not establish that there is no public necessity for the plan proposed; since, under Rem. & Bal. Code, § 925, the court is to determine the question of necessity, and can decide between the two plans when the occasion arises.

EMINENT DOMAIN—PROCEEDINGS—APPEAL—REMAND. Where, in eminent domain proceedings to raise the waters of a lake for a reservoir, there was no evidence as to the height of the dam necessary, nor as to how much land would be flooded, the case will be remanded for a hearing and findings thereon.

Certiorari to review a judgment of the superior court for Snohomish county, Bell, J., entered September 25, 1912, adjudging a public use, in proceedings to condemn lands for water power purposes. Reversed in part.

Hayden & Langhorne, for relator.

Shank & Smith, for respondents.

ELLIS, J.—This is a proceeding by certiorari to review an adjudication of public use and necessity in an action for condemnation. In its petition for condemnation, the Sultan Electric Company alleged, that it was empowered by its articles of incorporation to engage in the manufacture, sale, and distribution of electricity for light, heat, and power, and all other purposes both public and private; that it was duly authorized to appropriate such lands, real estate, and water rights as necessary or appropriate for the carrying out of its corporate purposes; that it had acquired a franchise from the town of Sultan for the construction of a plant for the manufacture, sale, and distribution of electricity for light, heat, and power purposes, and has obligated itself to carry out the terms of the franchise; that, in order to do so, it is necessary that the petitioner appropriate certain described

real estate. It then set out the names of the owners, encumbrancers, or other persons interested therein, among them that of the relator herein, and alleged that the petitioner and such owners or persons interested were unable to agree upon the proper compensation to be paid for the property. The prayer was in the usual terms.

The plan as outlined in evidence is to construct a dam about twelve feet high across a small stream called McCoy creek, which is the outlet of Lake Roeniger, in Snohomish county. From the dam, by means of an eighteen-inch pipe, water will be led down hill approximately 1,400 feet to the site of the proposed power station, giving a fall of about 214 feet, where it will be used to propel a water wheel connected with a generator of an approximate capacity of eighty horse power. From the power station, a transmission line will lead a little over a mile to the town of Sultan. McCoy creek, at certain periods of the year, becomes almost dry. As a part of the plan, it is the intention, therefore, to place a dam across the outlet of Lake Roeniger, in order to furnish a reserve of water to be let out gradually during the dry season and utilized in running the machinery. The current will be supplied to the business houses and residences in the town by means of overhead distribution wires. This overhead system was practically completed at the time of the hearing.

The relator contends that the proceeding should have been dismissed, because there was no proof that the respondent had bound itself to build the plant, or had adopted any survey, or taken any corporate action looking to the prosecution of the enterprise. Maps of surveys, showing the lands to be taken for the pipe line and the lands which would be flooded by the erection of the dams and the taking of which is asked for in the petition, were received in evidence upon the testimony of the surveyor who made them, but there was no evidence of any formal resolution of the trustees of the re-

spondent adopting the plan and location, or declaring that the lands sought are necessary to the enterprise.

It must be conceded that, in those jurisdictions where by statute the corporation itself determines finally the necessity of certain property for its use, and the location and adoption is in and of itself an act of appropriation which vests a conditional title in the locator subject only to the right of the owner to have the compensation assessed and paid, the formal act of location and adoption should be, and is, held a *sine qua non* to any right in the corporation to institute proceedings to assess the compensation. Thus, in Pennsylvania, under a statute providing that, "The president and directors of such company shall have the power and authority by themselves, their engineers, superintendents, agents, artisans, and workmen, to survey, ascertain, locate, fix, mark, and determine such route for a railroad as they may deem expedient," etc., it is held that this act of location and adoption must be formally authorized by the president and directors before it can be done with any effect, especially as between rival companies seeking the same location. *New Brighton & N. C. R. Co. v. Pittsburgh, Y. & C. R. Co.*, 105 Pa. St. 13; *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615; *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220.

Under such a statute it is held that:

"The act of location is at the same time the act of appropriation. The space covered by the line as located is thereby seized and appropriated to the purposes of the construction and operation of the railroad by virtue of the power of eminent domain, and nothing remains to be done except to compensate the owner." *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co., supra.*

See, also, *Hagner v. Pennsylvania S. V. R. Co.*, 154 Pa. St. 475, 25 Atl. 1082. Even in those jurisdictions where, as here, the question of necessity is one finally to be determined by the court and not by the corporation itself, in cases of

contest as to priority between rival corporations for the same location, the vital point being the *time* of location and not the mere *fact* of location, it is held that *priority in right* must be shown by a *priority in time* of formal adoption and actual survey. *Morris & Essex R. Co. v. Blair*, 9 N. J. Eq. 635.

The foregoing cases are cited and chiefly relied upon by the relator as showing that this proceeding should fail for lack of proof of a formal resolution adopting the location. They are not applicable to the situation here presented. They all, save one *(Morris & Essex R. Co. v. Blair, supra)*, arose under the Pennsylvania statute, which is construed as making the act of location the final determination of the necessity and appropriation, and they all, save one *(Hagner v. Pennsylvania S. V. R. Co., supra)*, arose upon a contest between rival companies for the same location, in which the *time* of location rather than the *fact* was the material thing as determining priority.

In this state the question of necessity is by statute a question for the court and not for the corporation itself to finally decide. Rem. & Bal. Code, § 925. In this proceeding the contest is between the petitioner and the landowner, and no question of priority arises. Nowhere in the statute governing the entire procedure (Rem. & Bal. Code, §§ 921-925), does it appear that a formal resolution, adopting the particular plan or location and declaring a necessity for the land, is essential either to pleading or proof as an indispensable prerequisite to the right to have a jury called to assess the compensation to be paid. The utmost force which can be accorded to a selection and location on particular land by the condemner is that of a *prima facie* showing of the necessity of that land to the enterprise. The actual determination of necessity is still a question for the court to determine upon evidence, however formal a selection by the corporation may be shown. *State ex rel. Postal Tel. Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855.

The filing of the petition describing the land sought, alleging the necessity and stating the purpose, is sufficient, as between the corporation and the landowner, to invoke the jurisdiction of the court to determine these things which in some other jurisdictions are determined by the corporation itself. It was admitted at the hearing that the petition was prosecuted by the duly authorized attorney for the condemning company. The thing sought in the petition was not *ultra vires* of the petitioner. The prosecution of the proceeding by its attorneys would, therefore, forever estop the petitioner to claim that the act was unauthorized. The admitted authorization of the attorney to prosecute the suit has the same force as a ratification of the act afterwards, and ratification has been held sufficient where no actual authority was ever given in advance.

"But if I were of another mind in respect to the authority to institute these proceedings, implied from the acts of the directors, I should still think that this order should not be vacated, for the act of the president in that regard has been since approved and adopted by the directors. The lack of authority, if such lack there was, has done no injury to prosecutor, who has had an opportunity to raise, and has raised, the real question in the case, viz., whether there was a necessity to take the lands for the purposes of this corporation." *Kountze v. Proprietors of Morris Aqueduct*, 58 N. J. L. 303, 33 Atl. 252.

Where, as in this state, the question of necessity is one for the court, both authority and reason sustain us in the view that the adoption of the plan and the necessity for the land, especially as between condemner and landowner, may be proved as any other fact, and no antecedent resolution or formal corporate action is essential to such proof. *Kountze v. Proprietors of Morris Aqueduct, supra; Lake Shore & M. S. R. Co. v. Baltimore & O. & C. R. Co.*, 149 Ill. 272, 37 N. E. 91.

Relator next contends that the proposed taking is not for a public use. The evidence, however, shows that the only

present market for electric current and the only present purpose of the respondent is to furnish electric light to the town and inhabitants of Sultan. While the articles of incorporation empower the respondent to manufacture and furnish electricity for all purposes, public and private, these uses are separable. In such a case, condemnation may be had for the public use only. It is not the objects for which the corporation is formed that prevent a diversion of the property condemned to a private use. "The preventive rests in the power of the state to compel it to exercise its granted privileges." *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198.

While the respondent seeks to utilize the fall of the creek to the extent of 80 horse power, and there is a present need for only about 30 horse power for public use, we think, in view of the probable growth of the town and the continually increasing domestic uses to which electric current may be put, the margin is not excessive. *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199. The evidence fails to show that there is any intention to use this power, either now or in the future, for other than the public use, except possibly in such small quantities as to be insignificant and incidental to the main public purpose. This does not deprive the enterprise of its public character so as to defeat the condemnation. *Tacoma v. Nisqually Power Co., supra; Slingerland v. Newark*, 54 N. J. L. 62, 23 Atl. 129; *Spaulding v. Lowell*, 23 Pick. 71; *State v. Eau Claire*, 40 Wis. 533.

It is next urged that there was no sufficient showing that the public interest requires the prosecution of the enterprise. It is claimed that this is one of the things which the statute (Rem. & Bal. Code, § 925), expressly refers to the court for decision upon evidence. This must be conceded. The statute plainly so states. It must also be conceded that public interest is not identical with public use. There are many enterprises which are in a sense of public interest, which are not

devoted to public use. Public interest is nevertheless a necessary concomitant of public use. Where, therefore, as in this case, the only present demand is for a public use, and the respondent has, by its franchise and by a contract with the town, bound itself to furnish the town with light, we must, in the absence of any evidence to the contrary, assume that it is of interest to the public that the enterprise be prosecuted in some form.

The evidence tended to show that, by extending the pipe line to Lake Roeniger, using all of the water (about ten second feet), and taking advantage of all of the fall from there to the power site, there could be produced about 550 horse power; that by so extending the pipe line, there could be produced at the power site over 100 horse power, using only two second feet of the water; whereas, by the plan proposed, there can be produced only 80 horse power, using six second feet of water. It is, therefore, argued that the public interest does not require that over 500 horse power of potential energy should be thus destroyed in order to develop only 80 horse power of actual energy. While no authority is cited in support of the relator's contention, there would be much force in this argument were it not for the very statutory provision upon which the relator relies. Whether the use is a public use, and whether the public interest requires the prosecution of the enterprise, and what lands etc. are necessary for the enterprise, are all matters referred to the court for determination. Rem. & Bal. Code, § 925. From this results the doctrine which, for lack of a better name, may be called comparative necessity. If by the plan proposed the present and future public use and interest, as now apparent from the evidence, are met, that is as far as the court need now inquire. If in the future a condemnation is sought for a public use which demands the development of the full power of which the stream and lake are capable, the court has the authority under the statute to determine whether the public interest then requires the prosecution of such new enterprise; and, if it

does, to permit the condemnation of the present proposed plant for the purpose, or to compel a modification of it to meet the new situation. That is to say, when the issue between the two plans is presented, the court, under the statute, will have the power to decide which of the two is demanded by the public interest. The principle is recognized, though based upon a different statute, in *Tacoma v. Nisqually Power Co.*, *supra*.

This meets every objection, except that there was not sufficient proof that the plan necessitated the raising of Lake Roeniger four feet in order to provide a reserve of water for use during the dry season. That a reserve of water is necessary was sufficiently established. There was, however, no evidence as to the height of the dam necessary at the outlet of the lake in order to produce that reserve, nor as to how much land would be flooded by such a dam as would be necessary.

The cause is therefore remanded, with leave to each side to make whatever showing can be made as to the necessity or lack thereof for the raising of the lake and the land to be flooded thereby, in order that the trial court may make a finding on evidence as to these things. It is so ordered.

Mount, C. J., Morris, Fullerton, and Main, JJ., concur.

[No. 10288. Department Two. November 15, 1912.]

A. W. Kopczynski, *Appellant*, v. Bolcom-Vanderhoof Logging Company, *Respondent*.[1]

Contracts—Evidence—Sufficiency. The evidence fails to establish a contract for slops for five months at ten dollars a month, where it appears that the defendant's foreman refused plaintiff a contract for longer than one month, directing him to the office of the company, where he paid $50 for five months on representing that the foreman had contracted with him therefor.

Contracts—Breach—Measure of Damages. In an action for breach of contract to furnish slops for hog feed, the plaintiff cannot recover for expenses incurred before entering into the contract in reliance upon obtaining the contract; as they could not have been within the contemplation of the parties.

Same—Measure of Damages—Profits—Evidence. In such a case, loss of profits cannot be recovered on the mere statement of what the hogs cost, what they sold for, and what might have been obtained if the contract had not been breached, where it appears that the plaintiff could have obtained feed elsewhere the cost of which was not shown, and there was no showing of the cost or profit from feed obtained under the contract.

Appeal from a judgment of the superior court for King county, Main, J., entered March 9, 1912, dismissing an action on contract, upon sustaining a challenge to the sufficiency of the evidence. Affirmed.

George B. Cole, for appellant.

Walter S. Fulton, for respondent.

Morris, J.—Appellant brought this action to recover damages for the alleged breach of a contract with respondent for furnishing slops and refuse from the cookhouse at its logging camp, for appellant's use in feeding hogs. At the close of the evidence, the court below sustained a challenge to its sufficiency, and plaintiff appeals.

In order to recover, it was essential that appellant should establish the contract and its breach, and then bring his

[1]Reported in 127 Pac. 601.

proof within the proper measure of damages. The evidence relied upon to establish the contract is that the foreman of the respondent's logging camp at Acme, in consideration of $10, gave appellant the right to take these slops for one month. This right was granted a second and third month on the same terms. Appellant then wanted to contract with the foreman for a longer period, but the foreman refused upon the ground of lack of authority, and directed him to go to the main office of the company at Seattle. He went to Seattle, saw Mr. Bolcom, and told him what the foreman said, and that Mr. Bolcom extended the privilege for five months and accepted $50 as payment therefor. Respondent's version is, that the foreman of the camp granted appellant the privilege of taking the slops, on payment of $10 a month; that appellant wanted to purchase the right for some definite time, but that the foreman refused to so consider the matter, and told him: "I can't guarantee the slops to you at all only a month at a time. If you want to pay $10 for a month's slops, you can pay it;" that appellant then went to Seattle and told Mr. Bolcom he had a contract for the slops at $10 a month, and wanted to pay the money to him. Mr. Bolcom asked him why he did not pay the money at the camp; he replied that he was on his way to Chicago, leaving his wife in charge, and that he did not want her to be bothered with the payments. Mr. Bolcom then told him if he wanted to pay the money there, he could do so, and he would give him a receipt. Appellant then handed Mr. Bolcom $50, and obtained a receipt "for $50 for slops for five months in advance."

That the respondent's version is the true one is, we think, evidenced by the fact that, on appellant's returning to Acme and telling the foreman what he had done at Seattle, the foreman became very angry, and refused appellant any more slops, and then, to use appellant's language, "the foreman licked me." If appellant had gone to Seattle to obtain the right to these slops for a definite time at the suggestion of

the foreman, we do not understand the reason for the foreman's anger to the extent of beating him for doing just what he had told him to do. Rather does this circumstance prove to us that the truth is the foreman refused appellant a contract, and appellant then sought to obtain one from the company, and succeeded in getting an acceptance of his $50, upon the statement that he already had a contract and only wished to pay the money in at the main office in order to save his wife inconvenience while he was absent at Chicago. This convinces us that appellant never had a contract. The great essential of a contract—that the minds of the parties must meet—is lacking.

However, assuming, as this was a question of fact, that the evidence upon the question of contract was sufficient to go to the jury, the next question the breach being admitted, is, Was there sufficient proof of damages? It was upon this point the court below, while doubting the existence of the contract, made the ruling complained of. The evidence relied upon by appellant to prove his damage was, that he had purchased a horse, wagon and harness which he was compelled to sell at a loss; that he had leased land and built hog pens which were a total loss; and his estimated profits. This expense was all incurred before his visit to Seattle, from which time his contract must date, if at all. He admits the foreman refused to give him a contract and sent him to Seattle to obtain it, and then he says the next day after his return from Seattle the foreman refused him slops. In other words, the contract was broken as soon as made, so that none of these expenses were incurred in reliance upon his contract, or to enable him to fulfill it, because he did not know until he interviewed Mr. Bolcom that he could obtain a contract. Anything he may have done prior to that date cannot be said to have been within the contemplation of the parties at the making of the contract. He was in exactly the same situation the day his contract was broken as on the day it was made. The contract had caused no change whatsoever

in these respects, so that the only damage that could be charged against the contract was the loss of these slops as feed for his hogs.

That in a proper case profits may be recovered upon the breach of a contract, when they are susceptible of proof, will not be doubted. Appellant, however, gave no testimony bringing him within this rule. He contented himself with showing that he purchased his hogs for $575 and sold them for $420, and that, had he been continued in his right to the slops, he could have made $1,500, based upon his profit the second and third months, when he was getting the slops, not under the contract but under his arrangement with the foreman. There is absolutely no proof that he could not obtain proper feed elsewhere. In fact, it is shown he could have obtained feed for the hogs at Acme. His reason for not doing so was that "it costs too much money." How much it would have cost, and whether he could have fed the hogs at a profit with the feed obtainable at Acme, is not attempted to be shown, other than his statement that he could not make a profit because "it costs too much money." This, we take it, is not sufficient; and, in order to recover, he must offer something other than his conclusion. He must show the cost of feeding his hogs with the slops until they were ready for market, other expense that might have entered into the cost until the hogs were ready for the market, and then what he could have obtained for them when they were so ready. From this proof it would be a simple matter to estimate his profits, if any. If we should assume that his estimate of the profits would be sufficient, he failed to show the cost of obtaining feed at Acme, or what it would have cost him to get his hogs into marketable condition with the feed obtainable at Acme. Until there was some proof of these facts, it would be a mere guess to attempt to estimate the cost of feeding, the supplies obtainable at Acme, and the gain or loss as compared with feeding the slops. Profits when recoverable cannot be guessed at. There must be some tangible proof upon which they can

be estimated with some degree of certainty. There was none in this case, and for this reason the case must fail.

Appellant relies upon *New Market Co. v. Embry*, 20 Ky. Law 1130, 48 S. W. 980. In that case the parties made a contract under which plaintiff was to take slops from a distillery, beginning November 1, and ending May 31 following. In reliance upon this contract, plaintiff purchased 638 cattle and placed them in pens at the distillery to consume the slop; the contemplation of the parties being that the cattle would be thus fattened and ready for the market on May 31. When the cattle had been fed on the slop so long that they could not be profitably fattened on anything else, the defendant, on January 15, shut down the distillery, when it was not practicable to get other slops to feed, and plaintiff was compelled to sell his cattle at a loss. It was held that a recovery could be had of the reasonable profits plaintiff could have made had the contract been carried out. The element sustaining a recovery in that case was that the cattle had been fed so long on these slops they could not be fattened at a profit on anything else, and no other slop was obtainable. That element is lacking in this case. On the contrary, it here appears that proper feed could be obtained elsewhere, with no showing of its cost to fatten the hogs, except appellant's conclusion that "it costs too much money." We think he should have gone farther than this and, having failed to do so, the court was justified in taking the case from the jury because of a failure of proof.

Appellant also cites *Lillard v. Kentucky Distilleries & Warehouse Co.*, 134 Fed. 168, another slop-feeding case. It will be noted that the court, in its opinion on page 178 says: "If the plaintiff had furnished no slop or had furnished only a part of that it contracted to supply, the loss resulting from any outlay for other food or for labor necessitated, or any other expense" would be recoverable. The plaintiff here failed to show "the loss resulting from any outlay for

other food," and there was no proof upon which an intelligent verdict upon that point could have been rendered. The respondent endeavored to repay appellant his $50, but he refused to accept it. For this reason its retention cannot be made an issue here.

The judgment is affirmed.

MOUNT, C. J., ELLIS, and FULLERTON, JJ., concur.

MAIN, J., took no part.

[No. 10511. Department Two. November 15, 1912.]

NORTHERN PACIFIC RAILWAY COMPANY, *Plaintiff*, v. GEORGE EDMUNDS *et al.*, *Respondents*, PETER MIKES *et al.*, *Appellants*.[1]

PRINCIPAL AND AGENT—WRONGFUL ACT OF AGENT—LIABILITY OF PRINCIPAL. Where a gang of laborers, boarding on a co-operative plan, contracted for and received provisions and supplies, the membership of the gang changing from time to time, and the membership at the time the gang broke up contributed *pro rata* a sufficient sum to pay for all the supplies, paying the money over to an agent for that purpose, the same amounted to a ratification of the indebtedness by the then members of the gang; and renders them liable therefor, upon the default of their agent, who wrongfully failed to pay over the money contributed.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered February 26, 1912, upon findings in an action of interpleader, after a trial to the court on the merits. Affirmed.

Gordon, Easterday & Askren, for appellants.

Joseph O'Neill, John E. Gallagher, and *C. E. Stevens*, for respondents.

MAIN, J.—This is an action of interpleader, brought by the plaintiff against George Edmunds, Ira C. Conger Company, Steve Prutsos, G. Mamalis and forty-three Greeks by

[1]Reported in 127 Pac. 587.

name, designating them as "Extra Gang No. 14." After the beginning of the action, Sourapas & Company, a corporation, became a party defendant by intervention. The cause was tried to the court without a jury. The vital facts, as found by the trial court, are these: Between the 27th day of July, 1911, and the 27th day of September, 1911, the men composing extra gang No. 14 were employed by the railroad company as section men, laboring on its railway track near Castle Rock, Washington. Each of them while in such employment earned a sum of money which is specifically set out in the findings of the trial court, aggregating a total of $1,591.16, which is due, owing, and unpaid. This sum had been paid into the registry of the court by the interpleader. Between the dates mentioned, the persons composing extra gang No. 14 changed from time to time; the changes consisted in some members being released from the service or quitting, and new members coming in. At the time when the work ceased, in the latter part of September, 1911, the membership of extra gang No. 14, as then composed, was partly different from the membership composing it at the time the work commenced in July, 1911. Some of the men who composed extra gang No. 14 when it began work about July 27, 1911, but not all, were defendants in this case.

With respect to the boarding arrangements of extra gang No. 14, the trial court found that these were conducted on a co-operative plan or basis, under and by virtue of which each member shared *pro rata* in the cost. The persons composing extra gang No. 14 contracted for and received goods, wares, and merchandise in the form of articles of food and provisions. This was done through the negotiations and acts of one Alec Thiakison, the interpreter, who acted as their agent, and through the negotiations and acts of members who were acting for and on behalf of themselves and the other members thereof. The goods, wares, and merchandise furnished were for the benefit of, and were consumed by, the

parties composing extra gang No. 14. As to the other defendants, George Edmonds, Ira C. Conger Company, Steve Prutsos, G. Mamalis, and Sourapas & Company, the court found that each of them had, between the 27th day of July, 1911, and the 27th day of September, 1911, furnished to extra gang No. 14 goods, wares, and merchandise which had not been paid for, and found the amount which was due and owing to each of said defendants. Prior to the beginning of this action by the railroad company, each of these defendants had begun an action against extra gang No. 14, and had caused writs of garnishment to be served upon the company. The court, at the conclusion of the trial, gave judgment against the members of extra gang No. 14 for the sums of money which it found were due and owing to the other named defendants, for the goods, wares, and merchandise which had not been paid for. From this judgment, the cause is brought here on appeal.

The question here presented is one of fact, and that is whether the goods, wares, and merchandise were furnished at the request of the members of extra gang No. 14 or through some person authorized to act for them. The appellants contend that the evidence does not sustain the findings of the trial court upon this question, while the respondent asserts that the findings are sustained by the evidence. From an examination of the statement of facts, we believe that the findings of the trial court are sustained.

The question then presents itself, whether or not the members of extra gang No. 14, made parties defendant in this action, being some but not all of the members that composed extra gang No. 14 when the members thereof began work on the 27th day of July, 1911, are liable for the goods, wares, and merchandise which were furnished between the dates specified. From the evidence introduced upon the trial, it appears that, shortly prior to September 27th, 1911, when the gang broke up, they had figured up the amount which was then owing to the various merchants who had furnished

them with supplies, and each of them had contributed his *pro rata* share which was necessary to meet all these obligations. This money was paid over to Alec Thiakison, the interpreter and their agent, with instructions to pay the obligations in question, but through his dishonesty the money was not so used. It is true that there is evidence in the record denying the fact that each of the members had contributed his *pro rata* share to this fund, but when we take into consideration the manner in which the boarding house was operated and all the surrounding facts and circumstances, as shown by the record, we believe that the evidence fairly preponderates to sustain the position that each did upon this occasion contribute his *pro rata* share. This being true, it was an act on the part of the members then composing extra gang No. 14 which plainly recognized their liability for the debts and obligations litigated in this action. Having thus recognized their liability, and having made Alec Thiakison, the interpreter, their agent, and entrusted him with the fund for the purpose of liquidating the same, we believe that the perfidy of the agent should be visited upon his principals, the members of extra gang No. 14, rather than upon the merchants who supplied the articles of food and provisions.

We, therefore, conclude that the judgment of the trial court should be affirmed.

MOUNT, C. J., MORRIS, and ELLIS, JJ., concur.

[No. 10415. Department Two. November 19, 1912.]

PETER WILSON *et al.*, *Respondents*, v. OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, *Appellant*.[1]

NAVIGABLE WATERS—HARBOR LINES AND AREAS—LOCATION OF PIERS—DAMAGES TO ABUTTERS—RIGHTS OF LESSEES. Since the state owns the beds and shores of navigable waters, under Const., art. 16, § 1, and is prohibited from giving any rights to private persons in waters beyond harbor lines established pursuant to art. 15, § 1, the state may establish pier head lines beyond the harbor lines, whenever it pleases; and hence a lessee of the state of abutting tide lands cannot show the establishment or change of pier head lines at locations advantageous to his leasehold for the purpose of enhancing the value thereof, in an action to recover for damages thereto.

NAVIGABLE WATERS—ERECTION OF STRUCTURES—AUTHORITY. Private individuals may, by consent of the Federal and state governments, erect structures in the navigable waters of the state.

NAVIGABLE WATERS—OBSTRUCTIONS—DAMAGE TO ABUTTER BY ERECTION OF BRIDGE—HARBOR AREA—USE. Where a pier for a railroad bridge across navigable water was placed on harbor area which the railroad company had leased from the state, any damage it might do to an adjoining owner by causing the water to shoal in front of such owner is *damnum absque injuria;* since it was caused by the lawful use of the railroad company's property.

NAVIGABLE WATERS—OBSTRUCTION—INJURY TO ABUTTERS—DAMAGES—EVIDENCE—REMOTENESS. Opinion evidence that a pier for a railroad bridge would cause the water to shoal in front of adjoining property is too remote and speculative to show damages to such property; although if such damages actually occur in the future, compensation therefor may be recovered.

NAVIGABLE WATERS—OBSTRUCTION BY BRIDGE—DAMAGE TO ABUTTERS—MEASURE OF DAMAGES. In an action by the lessee of tide lands, for damages by reason of the erecting of a railroad bridge across navigable water, the plaintiff may recover all damages caused to his property is so far as it differs in kind from the damages to other property generally; as in rendering the property less convenient of access by reason of its close proximity, but not for damage by the necessity of passing through a draw, inflicted on all property alike; hence the difference in value before and after the erection of the bridge is not the true measure of damages.

[1]Reported in 127 Pac. 847.

SAME — ACTION FOR DAMAGES — TRIAL — INSTRUCTIONS—EVIDENCE. In an action by a lessee of tide lands for damages to his property by the construction of a railroad bridge across navigable water, error in the admission of evidence to show the value of the land before and after the erection of the bridge is not cured by an instruction that damages could not be recovered for an interference with the navigation of the river, where the testimony failed to show what portion of the decreased value was due to the manner in which the bridge was constructed, and what portion to hindrance in navigation.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered January 22, 1912, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages to land by the construction of a railroad bridge. Reversed.

Bridges & Bruener (*Bogle, Graves, Merritt & Bogle*, of counsel), for appellant, contended, *inter alia*, that no private individual has any rights whatsoever beyond the outer harbor line. *Portland v. Montgomery*, 38 Ore. 215, 62 Pac. 755; *Illinois Central R. Co. v. Illinois*, 146 U. S. 387; *Attorney General v. Boston & L. R. Co.*, 118 Mass. 345; *People v. New York & S. I. Ferry Co.*, 68 N. Y. 71; *Miller v. Mendenhall*, 43 Minn. 95, 44 N. W. 1141, 19 Am. St. 219, 8 L. R. A. 89. The plaintiffs' private rights are confined to the waters in front of their wharf. *Chicago Yacht Club v. Marks*, 97 Ill. App. 406; *Yates v. Milwaukee*, 10 Wall. 497; *Rumsey v. New York & N. E. R. Co.*, 133 N. Y. 79, 30 N. E. 654, 28 Am. St. 600, 15 L. R. A. 618; *Union Depot St. R. & Tr. Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; *Bailey v. Philadelphia etc. R. Co.*, 4 Har. (Del.) 389, 44 Am. Dec. 593; *Austin v. Rutland R. Co.*, 45 Vt. 215.

J. C. Cross (*A. Emerson Cross*, of counsel), for respondents, contended, among other things, that the waters in question are within the control of the commerce clause of the Federal constitution. *Rhea v. Newport N. & M. V. R. Co.*, 50 Fed. 21; *The Daniel Ball*, 10 Wall. 557; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Miller v. Mayor of New York*, 109

U. S. 385. The right given to respondents by the secretary of war is a property right vested in respondents, and the action of appellant in preventing the building of respondents' dock is a taking of their property without due process of law. *South Carolina v. Georgia*, 93 U. S. 4; *Wisconsin v. Duluth*, 96 U. S. 379; *United States v. Milwaukee & St. Paul R. Co.*, 5 Bissell (U. S.) 410; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211. The government has no more property in the water than a riparian owner or the public. *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Dec. 393; *Brown v. Cunningham*, 82 Iowa 512, 48 N. W. 1042, 12 L. R. A. 583. The legislature cannot authorize the construction of a railroad between high and lower water mark or anywhere below the line of private ownership, without compensation to the riparian owner. Lewis, Eminent Domain (2d ed.), ch. 5, § 84. *Railroad Co. v. Remnick*, 102 U. S. 180; *Carli v. Stillwater St. R. & Tr. Co.*, 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290; *Union Depot St. R. & Tr. Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; *Delaplaine v. Chicago & N. W. R. Co.*, 42 Wis. 214, 24 Am. Rep. 386; *Diedrich v. Northwestern Union R. Co.*, 42 Wis. 248, 24 Am. Rep. 399; *Railway Co. v. Renwick*, 102 U. S. 180; *Drury v. Midland R. Co.*, 127 Mass. 571. One riparian owner cannot project his wharf beyond the outer harbor line in such a way as to injure the adjoining riparian owner. *Proprietors of Maine Wharf v. Proprietors of Custom House Wharf*, 85 Me. 175, 27 Atl. 93; *Laughlin v. President etc. of Lamasco City*, 6 Ind. 223; *Delaware River Steamboat Co. v. Burlington & B. Steam Ferry Co.*, 81 Pa. St. 103. Respondents' special injury was a material element for the consideration of the jury in assessing their damages. *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654; *Harrison v. Sterett*, 4 Harr. & McH. (Md.) 540; *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435; *Brayton v. City of Fall River*, 113 Mass. 218, 18 Am. Rep. 470.

FULLERTON, J.—The appellant, a railroad company, constructed a railroad between the city of Centralia, in the state of Washington, and the city of Aberdeen therein. In doing so, it was found necessary to erect a bridge across the Chehalis river, at a point on the same where the tides ebb and flow. Before the bridge was erected, plans and specifications thereof were submitted to and approved by the proper officers of the United States and the state of Washington, and the erection of the bridge authorized.

Inside of the harbor lines, the bridge was erected wholly upon lands belonging to the railroad company. Lying immediately to the north of the railroad company's lands, on the west side of the river, were lands belonging to the respondents. These consisted of a freehold interest in lots 1 and 2 of block 52, as known and designated upon the original plat of the city of Aberdeen, and lot 5, in tract 17, of the Aberdeen Tide and Shore Lands, as platted by the state of Washington; and a leasehold interest granted by the state, having some fifteen years to run, in the harbor area lying in front of lot 5, a tract of land some 68 feet in width and 103 feet in length. The railroad company's bridge did not cross the Chehalis river at right angles to the stream, but crossed the same somewhat diagonally; the easterly end of the bridge —the end across the stream from the respondents' property —being farther up the stream than the westerly end. The effect of this diagonal course caused the northerly side of the bridge to make an angle with the southern line of the respondents' property of some 21° 26′, or an angle of 88° 84′ with the line marking the harbor area. The northerly side of the bridge was constructed within six inches of the southeast corner of the leased harbor area, and the bridge as it crossed the stream passed in front of this area. The bridge was erected on concrete piers, with a draw in the center of the stream. One of these piers was erected inside the harbor area, but close to the water side thereof, and another some 161 feet therefrom out into the stream.

This action was brought by the respondents to recover the sum of $25,000, alleged to have been suffered by them in damages to their property caused by the erection of the bridge. In their complaint they alleged that their property was valuable chiefly for wharfage purposes, and that the bridge of the appellant was erected upon and in front of the property in such a manner as to practically destroy it for such purposes; that the piers which were erected to support the bridge would cause the water to shoal in front of the property, which shoaling would further interfere with the use of the property, and would eventually cause the river in front of the property to so far fill up as to render the same unnavigable. Issue was taken on the allegations of the complaint and a trial had thereon before a jury, which resulted in a verdict and judgment in favor of the respondents for the sum of $5,500. This appeal followed.

The errors first assigned relate to the admission of evidence. The respondents, over the objection of the appellant, were permitted to show that, subsequent to the time of the establishment by the state of the harbor lines in front of their property and their lease of the harbor area included therein, the government engineers made a change in the government pier head line in front thereof by moving the same further out into the stream; that, whereas, such pier head line had been established originally so as to practically coincide with the state's outer harbor line, the change placed it some twenty-six feet further out therefrom. They were permitted to show, also, that certain persons holding property situated further up the river than the respondents' property had erected wharves extending into the stream out to this changed pier head line. The evidence was admitted on the theory, as the court explained, that the change in the pier head line tended to enhance the value of the respondents' property. This evidence we think should not have been admitted. Were it necessary for a better understanding of the surrounding situation to show that the government pier head line had

been moved from the immediate front of the leased property to a distance of 26 feet therefrom further out into the stream, no objection could be urged against the showing, and no harm could accrue therefrom, but it was prejudicial error to allow the fact to be shown as enhancing the value of the respondents' property. In virtue of the state constitution, the state owns the beds and shores of all the navigable waters of the state (Const., art. 16, § 1); and is by the same instrument required to establish harbor lines in such navigable waters wherever such waters lie within or in front of the corporate limits of any city; and is prohibited from giving, selling, or leasing to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines. Const., art. 15, § 1. The legislature has enacted statutes carrying into effect these provisions of the constitution, and the harbor lines and harbor area, leased by the respondents and in question here, were established and leased pursuant to these provisions of the constitution and laws. It follows that the establishment of government pier head lines out from and beyond the harbor lines established by the state can confer no rights on individuals who have leased harbor areas from the state. Since the state owns the beds and shores of the waters in which such pier head lines are established, it may do therewith as it pleases; and if it chooses to establish its harbor lines a less distance into the waters than the pier head lines extend, it has a perfect right to do so. And having such right, its lease of the more limited area confers no right on the lessee to the greater area, and it was error in this instance for the court to assume that the change in the government pier head lines enhanced the value of the respondents' holdings.

It is not necessary to discuss the question whether the United States may, against the will of the state, give authority to a private individual to erect structures in the navigable waters of the state, as the United States has never manifested its purpose so to do. The effect of the congres-

sional acts upon that subject, as interpreted by the supreme court of the United States, is to make the erection of structures in the navigable waters of a state depend upon the concurrent or joint assent of both the national and state governments.

"The secretary of war, acting under the authority conferred by congress, may assent to the erection by private parties of such a structure. Without such assent the structures cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies." *Cummings v. Chicago*, 188 U. S. 410.

The court permitted certain witnesses to give it as their opinion that the piers supporting the bridge located nearest the respondents' property would cause a shoaling of the waters on their up river sides, and that this shoaling would interfere with the water approach to the wharves erected on such property. The appellant objected to the introduction of the evidence when the same was offered, and urges in this court that its admission was error. We think the contention is well founded. The pier nearest to the respondents' property was erected on the harbor area which the appellant had leased from the state. It is a lawful structure, and there is no pretense that it was carelessly or negligently constructed. Such being the facts, such incidental damage as it might do to the respondents' property in the way of causing the waters to shoal is *damnum absque injuria*, and cannot be recovered for by the respondents. Indeed, it is contemplated by the constitution and statutes creating this area that it shall be used in the aid of commerce and navigation. The lessee thereof is permitted to place upon such land, even to the full extent of its area, docks, wharves and other structures. These may be constructed of such material as the owner decides most fit, even to the extent of shutting off entirely the flow of water thereon. This must be the rule, else no lessee of the harbor area could improve his property without paying damage to the adjoining lessees.

Again we think this evidence too remote and speculative to furnish a just measure of damage in the present case. How unreliable and prone to mistake this character of testimony generally is, was shown in the present case. At the time of the trial, the bridge had been constructed and in operation for a considerable period of time. The appellant's engineers had taken soundings around all of the piers at stated intervals, and had found that the waters, so far from shoaling around the piers mentioned by the respondents' witnesses, had actually deepened around them—so much so that it was believed necessary for their protection to place a concrete base or floor for a considerable space about them in order to prevent further washing. Compensation for actual loss sustained is the fundamental principle upon which the law bases an allowance of damages. This rule precludes the consideration of consequences which are contingent, speculative or merely possible. The probability that future injurious consequences will arise from a given injury must be shown with reasonable certainty before they can be made the basis for estimating damages. Such reasonable certainty does not appear from the character of testimony in consideration here.

The foregoing considerations require the exclusion of the evidence objected to as to each of the piers. It is well, however, to say that the rule announced will not preclude the respondents from subsequently maintaining an action for damages if actionable injury be done to their property in the future by the shoaling of the waters around the outer pier. The railroad company, by the construction of the bridge, assumed the responsibility of compensating the owners for all real property taken or damaged thereby. If this was not done in the original condemnation suit, action can be maintained for such injuries as they accrue whether immediately or in the future.

For the purpose of showing in what manner the property was damaged by the construction of the bridge, and the

amount of such damages, the court permitted witnesses to testify, over the objection of the appellant, that boats plying on the river could not approach the property except from the upper river side, and then only with considerable danger, and when the tide was flowing; it also allowed certain others to give their opinions as experts as to the different values of the property immediately before and immediately after the construction of the bridge; all of which is urged as error in this court. As to the evidence relating to the manner in which the bridge damaged the property, we think it clearly admissible. The respondents were entitled to recover for all damages caused their property by the construction and maintenance of the bridge in so far as such damages differed in kind from that caused property generally along the river; for example, in so far as the bridge rendered the property less convenient of access by requiring boats desiring to visit the property from the lower river to pass through the draw in the bridge before reaching the property, no damage could be recovered for such inconvenience as this was a damage inflicted upon all property lying above the bridge. But in so far as the bridge, by its close proximity to the property, or because of the angle which it made with reference to the river line of the property rendered it difficult of access, it was a damage not suffered by all property alike, and hence is recoverable under the rule stated.

We think, however, that it was not a correct measure of the damages to the property to take the difference in its value immediately before and immediately after the construction of the bridge. This method of admeasurement necessarily included damages which were not recoverable, as it included the general damage suffered alike by all property on the stream caused by the injury to navigation which the erection of the bridge entailed. It may be true that damages from this cause increases as the bridge is approached, but it is nevertheless a nonrecoverable item, since the dif-

ference is one of degree and not of kind. The evidence of the difference in value, therefore, since it failed to take into account this nonrecoverable item, should have been excluded on the appellant's objection.

But it is said that the court in its instructions to the jury cured any error that might be predicated upon this omission in the evidence. The court did, it is true, instruct the jury to the effect that, for any interference with the navigation of the river caused by the bridge, no damages were recoverable. But it is plain that this could not cure the error here complained of, as such error was fundamentally inherent in the evidence itself, and could not be reached by instruction. Stated in another way, the evidence furnished no means by which the jury could ascertain what portion of the decrease in value of the property caused by the bridge was due to the hindrance to navigation, or what portion of such damages was due to the manner in which the bridge was erected, and as the omission could be supplied by evidence only, it was not curable by instructions to the jury. The remaining assignments require no separate consideration. The judgment is reversed, and a new trial awarded.

MOUNT, C. J., ELLIS, and MORRIS, JJ., concur.

[No. 10549. Department One. November 20, 1912.]

LUTHER CUNNINGHAM, *Respondent*, v. ADNA MILL COMPANY, *Appellant*.[1]

MASTER AND SERVANT — FELLOW SERVANTS — DIFFERENT EMPLOYMENT. Fallers in a lumber camp working near the haul back line falling trees, out of view of the logging crew hauling out the logs, are not fellow servants of a rigging slinger engaged with the hauling crew, since the character of the employment is different.

MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE—FAILURE TO SIGNAL. Where a hauling crew in a logging camp was out of the view of the tree fallers working in another place near the line, it is the

[1]Reported in 127 Pac. 850.

nondelegable duty of the master to see that a warning is given before a tree is allowed to fall across the line in such a way that it is liable to injure members of the hauling crew.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. It is for the jury to determine whether a rigging slinger was guilty of contributory negligence in standing in the bight of the cable while it was idle and the donkey engine was not applying power.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 22, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a rigging slinger in a logging camp. Affirmed.

Reeves Aylmore, Jr., and *A. A. Hull*, for appellant.

Forney & Ponder, for respondent.

CROW, J.—Action by Luther Cunningham against Adna Mill Company, a corporation, to recover damages for personal injuries. From a judgment in plaintiff's favor, defendant has appealed.

The only question presented is whether the trial court erred in denying appellant's motions for a nonsuit, for a directed verdict, and for a judgment notwithstanding the verdict. Respondent was employed as a rigging slinger in appellant's logging camp. The crew of which he was a member was engaged in hauling logs from the woods where they were left by the fallers, and conveying them to a loading platform. A donkey engine furnished power to move the logs by means of a cable operated on a drum, the cable extending from the engine into the woods. The logs were attached to the cable by the gang of which respondent was a member, and were hauled in by the engine. A haul back line, operated on another drum of the engine, was used to draw out the main cable and return it to the woods to bring in other logs. The haul back line was attached to the end of the main cable, and passed through two pulleys, so that it and the main cable formed a triangle, the long sides of

which at the wider portion were more than two hundred feet apart. Both lines extended across a ravine some fifteen or twenty feet deep and one hundred feet wide, which caused them to be raised or suspended above the surface of the ground.

On the morning of the accident, respondent was assisting other members of his crew to draw or spring the main cable towards and attach it to a log which they intended to move. Just at this instant, certain fallers, members of another crew employed by appellant, who were working some two or three hundred feet distant, caused a large tree to fall across the suspended haul back line above the ravine. The terrific force thus suddenly applied caused the haul back line to spring the main cable, and throw respondent a considerable distance, inflicting the injuries of which he now complains. There was evidence that the fallers could see the haul back line; that, by the exercise of ordinary care, they could have caused the tree to fall so that it would not strike the line; that the tree when standing was some sixty or ninety feet beyond the line; that respondent and the crew of which he was a member could not see the fallers, and that no signal or warning was given to respondent that the tree was about to fall across the line.

Respondent claimed, and the jury found, that appellant was negligent in failing to cause any warning or signal to be given. It seems to us that the mere statement of this case shows that the only issues involved were issues of fact, which were for the exclusive consideration of the jury. Appellant contends that the fallers and the respondent were fellow servants, and that the negligence of the fallers, if any, was that of respondent's fellow servants, for which the appellant is not liable. The evidence shows that respondent and the fallers were working in separate places, at a different character of employment, and that they were not in view of each other. This being true, the failure of the master to see that a proper warning or signal was given, before the

fallers, whom respondent could not see, caused a large tree to fall across the haul back line, constituted negligence, as it necessarily exposed respondent to a sudden and unexpected danger. Under such circumstances, it was the nondelegable duty of the master to see that a signal or warning was given.

Appellant contends that respondent was guilty of contributory negligence in that he voluntarily stood in the bight of the line, which exposed him to unnecessary danger. There was no danger from the bight of the line while it was idle and the donkey engine was not applying power. It was for the jury to determine whether, under all the facts and circumstances, the respondent was negligent. The only issues involved were issues of fact, all of which the jury resolved in respondent's favor.

The evidence sustains the verdict. The judgment is affirmed.

MOUNT, C. J., PARKER, GOSE, and CHADWICK, JJ., concur.

[No. 10456. Department One. November 20, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. HARRY P. BOTCHFORD, *Appellant*.[1]

FISH—OFFENSES—POLLUTION OF STREAM—EVIDENCE—SUFFICIENCY. A conviction of polluting a stream, under Rem. & Bal. Code, § 5200, is sustained where it appears that the defendant was foreman of the only mill on the stream, and that sawdust was conveyed from the mill to the bank and allowed to escape into the stream in sufficient quantities to endanger the spawn and fish therein.

Appeal from a judgment of the superior court for King county, Main, J., entered September 16, 1911, upon a trial and conviction of polluting a stream. Affirmed.

Byers & Byers, for appellant.

John F. Murphy and *Thomas J. L. Kennedy*, for respondent.

[1]Reported in 127 Pac. 837.

PER CURIAM.—The defendant, charged before a justice of the peace, with permitting sawdust, planer shavings, and other lumber waste to be cast into Raging river, in King county, was convicted, and appealed to the superior court, where he was again convicted and fined. He now appeals to this court.

The prosecution was based on § 5200, Rem. & Bal. Code. The complaint charged that:

"He, said Harry P. Botchford, in the county of King, state of Washington, on the 6th day of July, 1911, did wilfully and unlawfully permit sawdust, planer shavings and other lumber waste to be cast into Raging river, a river within said county of King, and state of Washington, where fish resort to spawn; contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Washington."

The evidence shows that appellant was foreman of the Northwest Lumber Company, a corporation, having charge of its mill located on Raging river, in King county; that he had the direction and superintendence of the men employed in the mill; that he gave orders on his own responsibility; that a large quantity of sawdust from the mill was permitted to accumulate upon the bank of the stream at the water's edge; that sawdust came from one of the saws, and with the aid of a small stream of water, was conveyed through a flume to this embankment; that it escaped into Raging river, a stream where fish resorted to spawn; that the mill was the only mill on or near the stream; that on or about July 6, 1911, lumber waste and sawdust were thus cast into the stream in sufficient quantities to endanger the spawn and fish in that stream, and also spawn and fish in the Snoqualmie river, to which the Raging river is tributary.

Appellant contends that the trial court erred in the admission and rejection of evidence, in giving instructions, in refusing requested instructions, and in denying his motions in arrest of judgment, and for a new trial. We have read the record with great care, and conclude the evidence so

clearly shows that the sawdust cast into the river came from the mill of which appellant was foreman, that we fail to understand how the jury could have returned any verdict other than the one they did return. Each and every objection which appellant has raised strikes us as technical and without merit. The case was fairly tried; no prejudicial error was committed in ruling upon the admissibility of evidence; the law of the case was clearly, concisely and properly stated to the jury; and the record shows that the appellant without question was guilty of a violation of the statute and was properly convicted. The judgment is affirmed.

[No. 10520. Department Two. November 20, 1912.]

F. G. LARKIN, *Respondent*, v. HANS PEDERSON *et al.*, *Appellants*.[1]

SALES—ACTION FOR PRICE—PAYMENT—EVIDENCE—SUFFICIENCY. In an action for a balance due from two partners for electrical equipment to be used in four city contracts, upon the allegation that the partnership had extended to all the contracts, one of the partners cannot escape liability by asserting that the balance was due on the first contract in which he was not interested, where it appears that he fully paid up the first contract, before anything was due on the other three; even if the seller afterwards agreed with him that the payments so made might be applied on the other three contracts provided he in writing guaranteed payment of the balance, which was done.

MUNICIPAL CORPORATIONS—PUBLIC WORK—LIEN FOR SUPPLIES FURNISHED CONTRACTOR. In an action for supplies sold, against city contractors and a bank as their assignee of all moneys due and unpaid on the contract and retained by the city to satisfy liens filed against the contractor's bond, it is error to impress the remaining fund with a lien in favor of the plaintiff, as against the bank, where plaintiff had filed no lien against the same within the time required by law.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 25, 1912, upon find-

[1]Reported in 127 Pac. 844.

ings in favor of the plaintiff, in an action on contract. Affirmed in part and reversed in part.

John W. Roberts, for appellants.

Trefethen & Grinstead, for respondent.

Morris, J.—This action was brought against McDonald and Pederson, as partners, to recover the balance due upon equipment used in the installation of cluster lights at Seattle. It is conceded that McDonald had obtained four contracts with the city to install these lights, known as the 18th avenue, Broadway, Pike and Union, and East 45th street contracts. It is admitted by Pederson that he was interested with McDonald in the last three contracts, but denied that he had any interest in the 18th avenue contract. Respondent claims, and brought the action upon the theory of, a balance due upon all four contracts; while Pederson contends the balance unpaid was due upon the 18th avenue contract for which he is not responsible. The bank is made a party under its claim of an assignment of all moneys due and unpaid upon the contract, and retained by the city to satisfy liens filed against the fund, remaining unpaid upon the 18th avenue contract. The court below found in favor of respondent against both Pederson and the bank, and both have appealed.

The issues upon the trial narrowed down to these: Did the partnership extend to the 18th avenue contract, and was full payment made for all material furnished under that contract? The court below decided the last issue in favor of respondent's contention, making it unnecessary to determine the first. Other reasons are given by the court why it found in respondent's favor. They are, however, not material to this inquiry, if its holding is sustained that the 18th avenue contract was fully paid. We have read the testimony and examined the exhibits and we reach the same conclusion as did the court below, that three checks given by Pederson to respondent for the following sums, $2,000, $1,000, and $1,661.80 and aggregating the amount due on the 18th ave-

nue contract, were given and received in full payment for all material furnished under that contract. It is apparent that, at the time these checks were given, nothing was due under any of these four contracts except on that for 18th avenue, and that between the giving of the first and the last of these checks, Pederson also paid respondent $3,788.76, the amount due for material upon the Broadway contract. The last transaction between Larkin and Pederson was on Nov. 25, when Larkin demanded payment of the balance then due upon all the contracts. After some hesitation, Pederson, desiring if possible to reimburse himself for his evident loss on the contracts out of the moneys then retained by the city on the 18th avenue contract, proposed to Larkin to pay the balance then due if Larkin would consent to apply the $4,661.30 already paid on the 18th avenue contract, to the balance then due on the last three contracts; to which Larkin consented, conditioned upon Pederson giving him a written guarantee to pay this balance providing he was unsuccessful in obtaining this amount from the city. Pederson agreed to this condition, gave a check for this balance, less $4,661.30, and gave Larkin a writing reading:

"Providing you fail to get the full amount of $4,661.30 from the 18th avenue contract due the Simplex Electric Company, on said job from Mr. Chas. F. McDonald, I agree to pay you what is lacking, providing claim is properly filed and presented to city of Seattle."

Larkin filed a claim the same day, but it was then a day too late, and the lien for this reason was rejected. The court below gave some regard to this transaction, and seemed to be of the opinion that, irrespective of the previous payment of the balance on the 18th avenue contract, Pederson was bound under this agreement. It is not material to here determine the respective rights and liabilities of the parties under this transaction of November 25. If, as the court below first held, the 18th avenue contract had been paid in full, then there could be no question but that the balance then due was a

liability of Pederson's, as the balance due upon the last three contracts for which his liability was admitted. This would be determining a liability strictly within the issues, and making it unnecessary to determine the effect of this transaction of November 25, or whether Pederson's liability as a partner extended to the 18th avenue contract. If he had voluntarily made the payments on this 18th avenue contract under some unknown arrangement with McDonald, it is unnecessary to determine what that arrangement was, or whether the payments were made by McDonald or by Pederson. The checks were given by Pederson, and whether so given because of an admitted liability, or whether advanced as a loan to McDonald, they were given and received in payment of the indebtedness and ended the transaction.

After the lien claimants were all paid, there remained $2,151.39 in the hands of the city under the 18th avenue contract which was claimed by the bank under its assignment. As against the bank, the judgment recites:

"Said fund so remaining in the hands of the city clerk, amounting to the sum of $2,151.39, shall be paid to the Scandinavian American Bank whenever this judgment (against Pederson) shall be satisfied."

The bank appeals from this part of the judgment, and its appeal must be sustained. Larkin had no lien or claim against this fund, and we know of no law under which this fund could be impressed with a lien in favor of Larkin to secure the payment of his judgment against Pederson. This fund clearly belonged to the bank under its assignment when the court found that the 18th avenue contract had been paid in full, and the judgment should have so directed.

The judgment is affirmed as to Pederson and wife, and reversed as to the Scandinavian American Bank.

MOUNT, C. J., CHADWICK, ELLIS, and FULLERTON, JJ., concur.

[No. 10569. Department Two. November 20, 1912.]

JULIA E. BLINN, *Respondent*, v. HARRY L. GRINDLE *et al.*, *Appellants*.[1]

APPEAL—DECISION—LAW OF CASE. A decision upon a former appeal that an action was commenced within time limited by statute and was not barred by laches is conclusive on the second appeal.

ACTIONS—COMMENCEMENT—FILING COMPLAINT. Under Rem. & Bal. Code, §§ 167 and 220, where service of a summons is made within twenty-five days after the complaint is filed, the action is deemed commenced from the time of the filing of the complaint, and this applies to actions by private parties.

TAXATION—DEED—ACTION TO SET ASIDE—CONDITIONS PRECEDENT—TENDER OF TAX. A tender of taxes as a condition precedent to an action to set aside a tax deed is excused where it appears that the defendants claimed title to the land and plainly indicated that any tender would be refused.

Appeal from a judgment of the superior court for King county, Holcomb, J., entered January 29, 1912, upon findings in favor of the plaintiff, in an action to cancel a tax deed. Affirmed.

Vince H. Faben, for appellants.

Peters & Powell and *Marion Edwards*, for respondent.

MORRIS, J.—This appeal brings this case for the second time before this court. The first appeal was decided in *Blinn v. Grindle*, 58 Wash. 679, 109 Pac. 122, to which reference is made for the facts. The first judgment was one of dismissal, which was here reversed and the cause remanded with directions to proceed with the trial. This has been done. The court below on the further hearing sustained the action, from which judgment this appeal is taken.

The judgment is attacked upon three grounds: That the action was brought too late; that respondent was guilty of laches; and lack of tender. The first two contentions were

[1]Reported in 127 Pac. 840.

disposed of on the former hearing. The former appeal was taken from a judgment based upon the opinion of the lower court that plaintiff was guilty of laches. This court held that the action was not barred by laches, and that it was commenced within the time limited by statute. No new facts are presented sufficient to change the ruling on the first appeal, and that judgment must be accepted as determinative. It might be added that, if the question were a new one, we would hold that, under the facts submitted showing the service to have been made within twenty-five days after the complaint was filed, the action would be deemed commenced from the time of filing the complaint rather than the time of service. Such is the plain meaning of §§ 167 and 220, Rem. & Bal. Code, this court having uniformly held that the last clause of § 167, relative to the commencement of actions, applies to actions by private parties. *Blalock v. Condon*, 51 Wash. 604, 99 Pac. 733.

Upon the question of tender, the case is controlled by *Gould v. Knox*, 53 Wash. 248, 101 Pac. 886; *Gould v. Stanton*, 54 Wash. 363, 103 Pac. 459; *Gould v. White*, 54 Wash. 394, 103 Pac. 460, and *Pillsbury v. Beresford*, 58 Wash. 656, 109 Pac. 193; and, for the reasons there given, tender was waived.

The judgment is affirmed.

MOUNT, C. J., ELLIS, MAIN, and FULLERTON, JJ., concur.

[No. 10646. Department Two. November 20, 1912.]

First National Bank, *Appellant*, v. The City of Seattle *et al.*, *Respondents*.[1]

Municipal Corporations—Public Work — Contracts — Performance or Breach—Extras—Evidence—Sufficiency. In an action against a city on a contract for laying a sewer, the plaintiff is not entitled to recover for extra work through a change of grade, requiring the relaying of pipe, where it appears that the pipe had to be relaid because out of alignment in violation of the contract, and the change of grade was at the contractor's request and did not call for extra work under the plan under which he submitted his bid; especially where supplemental contracts waived all the extras contemplated by the parties at the time the work was done, and no claim for extras was made as required by a stipulation in the contract that such extras must be submitted previous to the final acceptance.

Same. The fact that the city allowed a claim for extras for relaying part of the pipe, does not entitle the plaintiff to a claim for extras for laying the balance.

Same—Claims of Laborers—Right to Balance Retained. As between an assignee of a contractor, and a surety company guaranteeing labor claims, under a city contract for public work providing that 70 per cent of the amount earned should be paid the contractor as the work progressed, and 30 per cent retained by the city to secure the payment of laborers and materialmen, any balance due to the contractor on the completion of the work after deducting 30 per cent must be applied to discharge unpaid labor claims in excess of the 30 per cent retained by the city for their security, where the contractor agreed to pay all such claims, and that the city might withhold all payments until satisfied that all wages were paid, and the assignment recited that it was not valid against any claim for labor or materials.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 2, 1912, in favor of the defendants, in an action on a contract for public work. Affirmed.

[1]Reported in 127 Pac. 837.

James Kiefer, for appellant.

James E. Bradford and *Howard M. Findley*, for respondent City of Seattle.

John W. Roberts, for respondent National Surety Company.

MORRIS, J.—In June, 1909, the city of Seattle awarded a contract to Paul Steenstrup, assignor of appellant, for the construction of the north trunk sewer outfall. The work to be done under this contract consisted in the extension of the sewer to deep water, a distance of about 750 feet. The general plan called for the laying of large concrete sewer pipe, the construction of a manhole, and beyond that a line of 48-inch cast iron pipe; and at the outer end of the pipe a large elbow. The total length of cast-iron pipe to be laid under the contract was 414 feet, of which Steenstrup had laid about 174 feet, when he was notified that the city would not accept his work and that the pipe beyond a designated point would have to be taken up and relaid. Soon thereafter work was suspended. The work was resumed the following June, and the grade changing from a six per cent to a 6.6 per cent grade for one-third of the distance, and an 8.5 per cent grade for the remaining distance.

The first contention of appellant, as assignee of Steenstrup, grows out of this change of grade, it being contended that such change called for additional dredging which should be allowed as an extra, together with the cost of taking up and relaying the pipe. The lower court was of the opinion that the taking up and relaying of the pipe was not occasioned by the change of grade, but because of Steenstrup's failure to comply with the requirements of his contract. It is clearly apparent from the record that the lower court must be sustained in so holding. The necessity for relaying the pipe was because they were out of alignment, caused by pumping the dirt from underneath the pipes, in attempting to calk the joints with lead wool. This pumping materially

destroyed the level of the pipe, and as they went further out, they settled more and more out of line, until in some instances they were more than three feet out of alignment. The contract provided that the pipe should be laid to a true line and grade by such means as the contractor might devise. It was therefore incumbent upon Steenstrup to so lay his pipe as to preserve a uniform grade and alignment. When he failed solely because of the adoption of improper methods in laying his pipe, the city had a right to insist upon the pipe being taken up and relaid upon a true line. The change of grade from six per cent to 6.6 per cent and greater was in no wise responsible for this additional work. It was a very immaterial matter to the city what the grade was, so long as it preserved a true line and perfect alignment. The matter of grades is manifestly important in constructing a sewer in the ordinary street, where the flow depends upon the grade; but in this instance the flow was in no wise dependent on the grade, but on the elevation of the water at the point of discharge. At this point the outlet of the sewer was forty-five feet under water at high tide and twenty-eight feet under water at low tide. The flow of water through the pipes would therefore be conditioned, not by the grade, but by the elevation of the water or condition of the tide into which it discharged, the flow increasing as the tide dropped, and retiring as the tide rose. Steenstrup himself understood this, for the record establishes the fact that the change of grade was made at his suggestion and that of his subcontractor, because they evidently assumed by so doing they would be able to lay the pipe on a better foundation, and make it easier to preserve the alignment in the plan they adopted of beginning at the outer end and first setting the elbow, and, after it had become firmly imbedded and its elevation determined, they could then determine the necessary and proper grade to connect with the shore elevation. It also appears from the testimony of the city engineer that the actual amount of dredging was less than the amount indicated by the plans,

because as actually laid the pipe is not as deep as shown on the plans. We are, therefore, of the opinion that the change of grade, whether for the city's benefit or the contractor's, did not call for the doing of extra dredging not shown on the plan under which Steenstrup submitted his bid.

As further confirming the city's contention that Steenstrup did not at the time regard the relaying of this 48-inch pipe as an extra, and that the altered grade line was made with his consent, if not for his benefit, the record discloses that, on December 29, 1910, he entered into a supplemental contract with the city, whereby he agreed to furnish all labor and material in relaying the 48-inch pipe from station 3 plus 57 to station 4 plus 10 to conform to altered grade line, for $2,899.91. This agreement covers fifty-three feet of the 48-inch pipe. On the same day he entered into a similar agreement for placing the concrete foundation under the joints of the 48-inch pipe from station 4 plus 10 to the outer end of the sewer, for $2,117.36. This agreement covered the concrete under the joints from the end of the condemned portion of the pipe to the outer end, and was allowed by the city at the actual cost, plus fifteen per cent. It is plain to us that these supplemental agreements and allowances covered all the extras contemplated by the parties at the time the work was being done. These supplemental agreements were evidently made under a provision of the original contract providing that:

"No claim for any extras under this contract will be considered by the board of public works or city engineer unless the same shall have been submitted previous to the final acceptance of the work and passage of the final estimate."

The extras now claimed were never submitted to any one representing the city, nor was any claim made for them until this action was brought. It is immaterial to consider the reasons why the city allowed these items of extras, since no issue is here made concerning them other than appellant's claim that, since the city allowed for relaying the 53 feet

as an extra, it should be charged for laying the remainder of the pipe as an extra at the same rate. It is sufficient to say there is no supporting reason for such a contention.

The claim as against the National Surety Company is based upon the fact that the surety company gave its bond for the completion of the original contract by Steenstrup, and the question to be determined is, who is entitled to a fund of $5,730.47 now in the hands of the city as due under this contract. The contract provides that 70 per cent of the amount earned during each month should be paid the contractor as the work progressed, and the remaining 30 per cent should be retained by the city to secure the payment of laborers and materialmen. It is admitted that this fund of $5,730.47 represents the balance due Steenstrup under this 70 per cent provision of the contract. The entire 30 per cent having been paid out by the city, to lien claimants, appellant contends that, under its assignment from Steenstrup, it is entitled to this fund as against laborers and materialmen as a payment due the contractor, and that all sums belonging to this 70 per cent fund belong absolutely to the contractor, irrespective of claims of laborers and materialmen, which claims can only look to the 30 per cent fund for their satisfaction. The court below found, supporting the contention of the surety company, that the total earnings under the contract must be applied to the payment of labor and material in preference to the rights of the contractor. This conclusion of the court must be sustained. Appellant has no greater right to this fund than Steenstrup. It stands in his shoes. The contract provides that "the contractor agrees to pay the wages of all persons, and for assistance of every kind employed upon or about said work, and the board of public works may withhold any and all payments under this contract until satisfied that such wages or assistance has been fully paid." Under this provision, the contractor could not claim anything due under his contract, while claims for labor and "assistance of every kind" were

unpaid and filed with the city against the amount due under the contract. In addition, the assignment itself contains this stipulation:

"This assignment is not valid as against any claim for labor, material, provisions and goods supplied and furnished in the prosecution of this contract."

Those two provisions leave no merit in appellant's contention. In *State ex rel. Bartelt v. Liebes*, 19 Wash. 589, 54 Pac. 26, it is held that a stipulation in a contract for public improvement, providing that the contractor should not be paid until all claims for labor and material had been adjusted, was a valid one, and constituted the city a trustee for the benefit of unpaid laborers and materialmen. Appellant contends that *Dowling v. Seattle*, 22 Wash. 592, 61 Pac. 709, supports its contention. There was no question involved in that case, as to the right of an assignee of the contractor to this 70 per cent fund as against valid lien claimants, under the stipulation of the contract and the assignment. There, as here, the city bound itself by its contract to withhold 30 per cent of the amount due the contractor for the benefit of laborers and materialmen. This was done. It also agreed, as here, to pay the contractor 70 per cent monthly as the work progressed. This 70 per cent payment was made by delivering a public improvement bond to the contractor, and accepting his orders in favor of various parties who had advanced money to pay for labor and materials without any knowledge on the part of the city that the contractor would default in his payments for labor and material. Here the balance of this 70 per cent fund has not been paid the contractor, and the city has knowledge of these liens for labor and materials. In that case we held that the holders of the bonds so issued were entitled to their proceeds because the payments, being justified when made, were not invalidated by the contractor's subsequent default. In that case the payment was made when due under the contract, without notice of adverse claims. In this case the payment

has not been made, and there is notice of adverse claims such as, under the language of the contract and the assignment, are entitled to preference. It is clear from that opinion that, upon the case here submitted, the ruling would have been the same as we now make, for it is there said:

"It is true that the city, by virtue of a provision of the agreement which we have hereinbefore noted [the same provision as to withholding payments until all labor and assistance is fully paid as we have quoted] *might* have withheld all payments from the contractor until it was satisfied that all just claims for labor and materials had been fully paid."

This is, in effect, the holding in *State ex rel. Bartelt v. Liebes*, *supra*, so that, upon the question here submitted, the two prior cases are in harmony with our present holding.

For these reasons, we sustain the lower court, and the judgment is affirmed.

MOUNT, C. J., ELLIS, FULLERTON, and CHADWICK, JJ., concur.

[No. 10462. Department Two. November 20, 1912.]

TURLOCK FRUIT-JUICE COMPANY, *Respondent*, v. PACIFIC & PUGET SOUND BOTTLING COMPANY, *Appellant*.[1]

SALES — WARRANTY — CONSTRUCTION — WORDS USED IN TECHNICAL SENSE—EVIDENCE—ADMISSIBILITY. Upon a sale of bottled grape juice to one experienced in the bottling business, under a guaranty to protect against any fermentation, evidence is admissible that such a guaranty was generally construed in the trade as a warranty that the juice would not ferment while in the sealed bottles nor for a reasonable time thereafter; both parties knowing that the juice would ferment within a short time after the bottles were opened.

Appeal from a judgment of the superior court for King county, Yakey, J., entered November 10, 1911, upon find-

[1]Reported in 127 Pac. 842.

ings in favor of the plaintiff, in an action for goods sold and delivered. Affirmed.

James Kiefer, for appellant.

E. H. Guie, for respondent.

ELLIS, J.—This is an action for the purchase price of certain unfermented grape juice, a car load of which, manufactured by the plaintiff Turlock Fruit-Juice Company, in 1908, was in March, 1909, shipped to the defendant Pacific & Puget Sound Bottling Company, on consignment. The defendant, after retaining possession of the grape juice for about sixteen months, purchased it under the following admitted contract:

"This is to certify that we, the undersigned, have agreed to take over from the Turlock Fruit-Juice Company, stock on hand which is approximately 177 cases of quarts, 247 cases of pints, and 56 cases of splits Grape Juice at $1.25, $1.50 and $1.50 respectively, the same to be paid for as follows: October 1st, one-third, November 1st, one-third, and December 1st the balance.

"The Turlock Fruit-Juice Company agrees to protect us against any fermentation in connection with above mentioned goods.

"Dated July 22, 1910.

"(Signed) P. & P. S. Bottling Co.
"By H. M. Sorley, Sec. & Treas.
Turlock Fruit-Juice Co.
"J. D. Mushon, Gen. Mgr."

In the answer, it was alleged that the grape juice was worthless for commercial purposes by reason of fermentation. At the trial, by leave of court, the answer was amended by adding a paragraph:

"That at the time of making the contract it was known to the representative of the plaintiff that the defendant proposed to use the grape juice for the purpose of making grape soda."

Both defenses were denied by the plaintiff. The cause was

tried to the court without a jury. From a judgment in favor of the plaintiff for the full contract price, the defendant appealed.

The grape juice was in bottles. It was labeled and represented as pure, unfermented grape juice. There was no evidence that more than two bottles out of the entire stock fermented before the bottles were opened; nor was there any competent evidence that the grape juice became sour after the bottles were opened, until several days had elapsed, if kept in a cool place. The evidence showed that this will happen to all unfermented and unconcentrated grape juices. Both parties knew that this juice was unconcentrated. The evidence, however, did show that, when used in flavoring bottled soda water, the soda water would sour in a short time, but just how soon did not appear. While there was some mention of using the grape juice as a flavor for soda water at the time of the sale, the evidence wholly failed to show that the respondent knew that the appellant expected to use it in making bottled soda water, or represented that when so used it would never ferment. There was no sufficient evidence of any facts from which an implied warranty to that effect could arise.

The respondent was permitted to prove, by witnesses familiar with the business of manufacturing and dealing in bottled unfermented fruit juices, that a guaranty such as that found in the contract here in question would generally be construed in the trade as a warranty that the juice would not ferment while in the sealed bottles, nor for a reasonable time after the bottles were opened. The admissibility of this evidence presents the only debatable question in the case. A guaranty, like any other element of a contract, must be construed reasonably and in reference to the known nature of the subject-matter. Men will not be presumed to have exacted on the one hand, nor to have given on the other, a guaranty of the impossible. It is matter not only in evi-

dence in this case, but of common knowledge, that pure, unfermented and uncondensed fruit juices will, in their very nature, ferment after the bottles are opened, within a short time or a few days according to the temperature to which they are exposed. This grape juice when bought by the appellant had, to its knowledge, been bottled for about two years. The appellant was experienced in the bottling business. It knew all of these things as well as did the respondent. Both parties must be presumed to have contracted with reference to these known conditions. The fact that the words used in the guaranty are not in themselves technical terms, does not prevent them from being used in a technical sense, as determined by the nature of the business and usages of trade. This is especially true when, as here, a literal meaning would be unreasonable. Evidence as to the usual meaning of such a guaranty with reference to the subject-matter is always admissible as determining the real intention of the parties.

"Persons familiar with any art, calling, trade, etc., may state whether a word or phrase used in it has acquired a technical meaning, and if so what it is in any place where the significance is relevant. The terms need not be technical, scientific, or ambiguous in themselves." 17 Cyc. 80, 81.

"Where any doubt arises as to the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. In this case parol evidence is admissible *ex necessitate*." 17 Cyc. 682.

The evidence was plainly admissible as showing that the parties only intended a guaranty that the juice would not ferment in the bottles nor for a reasonable time after the bottles were opened. There was no competent evidence that

the grape juice here involved failed to meet the guaranty so construed.

The judgment is affirmed.

MOUNT, C. J., MORRIS, FULLERTON, and CHADWICK, JJ., concur.

[No. 10642. Department Two. November 20, 1912.]

E. L. EMERY, *Respondent*, v. THE CITY OF TACOMA, *Appellant*.[1]

MASTER AND SERVANT — FELLOW SERVANTS — INCOMPETENCY—EVIDENCE—SUFFICIENCY. There is sufficient evidence of the incompetence of a man employed as a nozzleman with a hydraulic giant, working under a high pressure, where it appears that he had worked for thirty days with a short straight nozzle, which took no particular skill, that the employee was excitable, and upon putting on a deflector, which made the work dangerous and required an experienced and cool man to control it, he objected to using the deflector as a "newfangled arrangement" and too complicated; any evidence of inexperience being proof of incompetence where experience was necessary

SAME—EMPLOYMENT OF INCOMPETENT FELLOW SERVANT—EVIDENCE OF NEGLIGENCE—SUFFICIENCY. Reasonable care in the employment of a nozzleman for a hydraulic giant equipped with a deflector, which would be dangerous if intrusted to an inexperienced man, is not shown by the fact that upon engaging him, he was asked if he had experience as a nozzleman and replied in the affirmative, where the nozzle then in use was a straight nozzle, which was simple and required no skill to control it, and he was not asked if he had had experience with a deflector.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 30, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee of a city on a street fill. Affirmed.

T. L. Stiles and *Frank M. Carnahan*, for appellant.

Gordon, Easterday & Askren, for respondent.

[1]Reported in 127 Pac. 851.

ELLIS, J.—This is an appeal by the defendant city of Tacoma from a judgment against it in favor of the plaintiff, for damages by reason of personal injuries suffered by him through alleged negligence of the city in employing an incompetent fellow servant. The sole question presented for our consideration is as to the sufficiency of the evidence to sustain the verdict and judgment.

The facts as established by the evidence were as follows: On June 5, 1911, the date of the accident, and for several months prior thereto, the city of Tacoma was and had been engaged in making a fill in Tacoma avenue at what is known as the Tacoma avenue bridge. The dirt was secured from an adjacent bank by sluicing, and was carried to the fill in sluice boxes. The sluicing was done by forcing water through a pipe connected with a hydraulic giant. Prior to the day of the accident, the giant had been equipped with a short straight nozzle, three or four inches long. About thirty days prior to the accident, one Andrew Shire applied for employment to the commissioner of public works, who had charge of the employment of men for this work. Claiming to be an experienced nozzleman, he was, without further investigation, sent to the head foreman on the work and immediately employed as nozzleman, so continuing until the accident. During all of that time, however, he used the straight, short nozzle which required no particular skill or experience to operate safely. The men engaged on the work were divided into two shifts, one working in the forenoon, the other from noon till night. Each shift had a foreman, that of the forenoon shift being head foreman. There was also an engineer in charge of the work, and both foremen were under his direction and control. Shire was nozzleman for the afternoon shift. At some time in the forenoon of the day in question, the head foreman removed the short straight nozzle from the giant and put on a deflecting nozzle. The best description of this nozzle found in evidence is that of the nozzleman of the forenoon shift. He said:

"The giant in the first place is straight, runs on a ball-bearing and swings around by hand. This deflector has a ball joint fastened to the end of the giant, and when the water strikes the deflector it plays back and forth, and there is a lever on the deflector and when you move the deflector, that means to glance,—when it strikes the ball it turns the giant, and when the water strikes direct, straight into the deflector, it goes straight through and there is no pressure, and when you pull it off the center, it strikes the side of the ball-bearing and that turns it, and it sets on a set screw, so that it is perfectly loose, and the water turns it back and forth. If you pull the lever to you it throws the point of the deflector away from you, and the water strikes her and that turns it towards you. You don't have to pull it at all; it moves itself. At that time there was 145 pounds pressure, and if you pull it off the center no man living can hold it."

The evidence amply shows that this would be a very dangerous instrumentality to intrust to the management of an inexperienced man. The foreman testified that Shire objected to the change in nozzles, called the deflector a "new-fangled arrangement," and said he did not want to work with it. That afternoon Shire was a few minutes late for work, and when he arrived the man who was operating the nozzle attempted to explain to him how to use it. Shire impatiently informed him that he knew all about it, told him to get out of the way, and took charge of it. At the time there were six or eight men at work in the pit shoveling the displaced dirt into the sluice boxes. Within a few minutes afterwards, a man named Alexon was knocked down by the stream, but under what circumstances does not fully appear. Within a very few minutes afterwards, Shire completely lost control of the nozzle, and it swung round so that the stream struck the respondent and two other men who were working by his side shoveling dirt into the flume, knocking them down and inflicting upon the respondent the injuries complained of.

The appellant contends that there was not sufficient evidence that Shire was incompetent, but on the contrary, the

fact that he had acted in the capacity of nozzleman for at least thirty days without accident or complaint proved his competence. There could be no question of the correctness of this position had there been no change in the nozzle. The evidence, however, makes it perfectly plain that a much greater degree of care, prudence, and experience is required for the operation of a deflecting nozzle with safety than that required for a straight one. The evidence was all one way, that the operation of a deflecting nozzle by a man of no previous experience with that kind of nozzle would be extremely dangerous to his fellow workmen. This was graphically expressed by the nozzleman of the forenoon shift, himself an experienced man. When asked what danger to others would result from the operation of a deflector by an inexperienced man, he said:

"There is as much danger as to get up on a locomotive and pull the throttle open and letting her go; a man wouldn't know what she would do; he did not know what to do to stop it, and if you were around there the water would hit you, because she would be in motion for a month, as long as the lever was off the center there was no way to stop it except to push it back on the center."

With such an instrumentality, it is obvious that any evidence of inexperience would be evidence of incompetency of the operator. The evidence was uncontradicted that Shire objected to the deflector as a "newfangled arrangement," and "objected to putting on of any additional inventions," said that he did not want to work with it, and seemed to consider it too complicated. From this evidence, the jury might easily conclude that the device was entirely new to him, and that he was wholly lacking in an essential element of competency, namely, experience with such an instrumentality. As opposed to this there was absolutely no evidence that he had ever used a deflector, further than his impatient remark to the man in charge when he came late to his work that afternoon. Moreover, there was evidence that, even with an ex-

perienced man, it required a cool head to operate a deflector with safety under high pressure, and that Shire was of an excitable disposition. However competent Shire may have been to operate a simple, straight nozzle, the jury was warranted by the evidence in finding him incompetent to operate the more complicated and dangerous deflecting nozzle.

But it is urged that, even conceding Shire's incompetence, there was no evidence of negligence on the appellant's part in employing him. This presents the question of reasonable care which is always a relative question determinable upon the exigencies of the particular service and the danger to be avoided. *Wabash R. Co. v. McDaniels*, 107 U. S. 454-460; 26 Cyc. 1295, 1296; 1 Labatt, Master and Servant, § 194. The head foreman, the engineer in charge, the foreman of the afternoon shift, and the nozzleman of the forenoon shift, all concurred in the statement that the use of the deflector would be dangerous if intrusted to an inexperienced man. The exigencies of the service certainly required a greater degree of care in the selection of an operator for the deflector than for the ordinary, straight nozzle. We are not impressed by the contention that the appellant had done its whole duty in this regard when its commissioner of public works asked Shire if he had had experience as a nozzleman and was content with an affirmative answer. The nozzle then in use was a straight nozzle, and there is no evidence that the use of a deflector was then contemplated; certainly it was not mentioned. The record is devoid of a single word of evidence that, either then or thereafter, any inquiry was made, either from Shire himself or from any other source, as to whether he had ever used a deflector. However long he may have handled the straight nozzle with safety, that was no evidence that he could operate the deflector. The very change of instrumentality should have suggested additional inquiry and care. While the evidence shows that an intelligent and careful man could learn to operate a deflector in half an hour or less, this, so far from excusing inquiry, em-

phasizes the ease with which Shire's competency or lack of competency could have been demonstrated. A short try-out without men in the pit would have settled the matter.

The appellant contends that a master has the right to assume that a servant will not undertake work which he has not sufficient skill to perform, in the absence of conduct indicating general carelessness. One case (*Hilton v. Fitchburg R. Co.*, 73 N. H. 116, 59 Atl. 625, 68 L. R. A. 428), so holding, is cited. While in that case a correct result was probably reached upon the facts, we cannot, in view of our own decisions and what we conceive to be the decided weight of authority, adopt that statement as a correct pronouncement of a general rule of law. It would relieve the master of any positive duty to make reasonable inquiry as to the competency of the servant, however dangerous to co-laborers the employment might be and however easy the ascertainment of the truth. It would substitute unreasonable complaisance for reasonable care. It would ignore the exigencies of the service. The following rule announced by the late Justice Harland in *Wabash R. Co. v. McDaniels*, *supra*, seems to us more consonant with the dictates of reason and humanity.

"But according to the best-considered adjudications, and upon the clearest grounds of necessity and good faith, ordinary care, in the selection and retention of servants and agents, implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the consequences that may result from negligence on the part of employes, is fairly commensurate with the perils or dangers likely to be encountered."

The nozzleman had been employed with the deflector nozzle but fifteen or twenty minutes prior to the accident. He had expressed a reluctance to use it, his language to the foreman indicating that it was new to him. Ordinary prudence would have suggested inquiry as to his knowledge and experience with so dangerous an agency. Reasonable care would have demonstrated his unfitness.

"When the master places a servant in charge of dangerous machinery where special knowledge, skill, or experience is required for its safe and successful operation, he must make reasonable effort to ascertain the qualifications of the servant thus employed, and if he fails to do so he cannot escape liability by showing that there was nothing in the conduct of the servant during the course of two hours' employment to demonstrate or give notice of his incompetency." *Pearson v. Alaska Pacific Steamship Co.*, 51 Wash. 560, 99 Pac. 753, 130 Am. St. 1117.

"Actual knowledge on the part of the master of the incompetency of a servant through whose acts another servant sustained injury is not indispensable to the injured servant's right of recovery. The master cannot screen himself from liability upon the ground that he did not know of the incompetency of the servant whose negligence caused the injury, if he might have known it by the exercise of reasonable care and caution." 26 Cyc. 1299.

See, also, *Seewald v. Harding Lum. Co.*, 49 Wash. 655, 96 Pac. 221; *Pope Glucose Co. v. Byrne*, 60 Ill. App. 17; *Scott v. Iowa Tel. Co.*, 126 Iowa 524, 102 N. W. 432; *Gilman v. Eastern R. Co.*, 13 Allen 433, 90 Am. Dec. 210. The question presented was, under the evidence, one for the jury. 1 Labatt, Master and Servant, § 186.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, MORRIS, and MAIN, JJ., concur.

[No. 10577. Department Two. November 20, 1912.]

PAULINE MILLER, *Appellant*, v. SARAH A. GUST, *Respondent*.[1]

LIBEL AND SLANDER—PRIVILEGE — ABSOLUTE PRIVILEGE — JUDICIAL PROCEEDINGS. Allegations in a complaint and affidavit in a divorce case charging adultery with a certain person are absolutely privileged if pertinent and relevant to the issue; and the rule of privilege is not changed by Rem. & Bal. Code, § 294, providing that every charge of adultery against a female shall be actionable "in the same manner as in the case of slanderous words charging a crime;" hence a complaint by the co-respondent for libel is demurrable, though the words are alleged to be false and malicious, where it is not charged that they were not pertinent and relevant to the issue.

Appeal from a judgment of the superior court for King county, Myers, J., entered January 20, 1912, dismissing an action for libel, on sustaining a demurrer to the complaint. Affirmed.

H. E. Foster, for appellant.

Edward Judd, for respondent.

ELLIS, J.—This is an appeal by the plaintiff from a judgment, upon a demurrer to the complaint, dismissing an action for libel. The alleged libelous matter was contained in papers filed in the divorce suit of Gust v. Gust, in the superior court of King county, which was recently reviewed by this court on appeal. *Gust v. Gust*, 70 Wash. 695, 127 Pac. 292. In that case, the complaint charged adultery between the defendant therein and some woman whose name was not given. Later an affidavit was filed in that case, stating that the woman referred to in the complaint was the plaintiff in the present action. The complaint in this action alleged these facts in detail, and stated that the defendant (respondent here) by these allegations maliciously and wickedly intended to injure the appellant in her good name, fame, and credit,

[1]Reported in 127 Pac. 845.

and to bring her into public scandal, infamy, and disgrace; that the charges were false, and that the respondent at the time of making them so knew.

The appellant contends that, by the provisions of the statute (Rem. & Bal. Code, § 294), charges of this character against a female are actionable, regardless of the usual rule of privilege. We think not. The statute says that such words shall be actionable "in the same manner as in the case of slanderous words charging a crime," etc. If, therefore, the words complained of were used under circumstances in which any other charge of crime would be privileged, then they also would be privileged. The rule of absolute privilege as to charges of crime made in the course of juridical proceedings which, if spoken or otherwise published elsewhere, would be actionable, is succinctly stated by the supreme court of Massachusetts as follows:

"Then we take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. The question, therefore, in such cases is not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry." *Hoar v. Wood*, 3 Met. 193, 197.

The foregoing language was quoted by this court with approval in *Abbott v. National Bank of Commerce*, 20 Wash. 552, 56 Pac. 376, in which case it is shown, on copious authority, that the privilege is grounded in a wholesome public policy which regards the public good, resulting from a free and untrammeled inquiry in courts of justice, as paramount to the redress of occasional private wrongs which may result from an abuse of the privilege. The following authorities in addition to those cited in *Abbott v. National Bank of Commerce, supra*, further exemplify the broad and absolute

character of the privilege where the matter, whether contained in pleadings or affidavits, is pertinent to the subject of the inquiry: *Strauss v. Meyer*, 48 Ill. 385; *Hart v. Baxter*, 47 Mich. 198, 10 N. W. 198; *Garr v. Selden*, 4 N. Y. (Comstock) 91; *Marsh v. Ellsworth*, 50 N. Y. 309; *Lea v. White*, 4 Sneed (Tenn.) 110; *Gaines v. Aetna Ins. Co.*, 104 Ky. 695, 20 Ky. Law 886, 47 S. W. 884; *Rall v. Donnelly*, 56 Ill. App. 425.

"Every affidavit sworn in the course of a judicial proceeding before a court of competent jurisdiction is absolutely privileged, and no action lies therefor, however false and malicious may be the statements made therein. So are all pleadings, and instructions to counsel. So are articles of the peace exhibited against the plaintiff. The only exception is where an affidavit is sworn recklessly and maliciously before a court that has no jurisdiction in the matter, and no power to entertain the proceeding. In all other cases the plaintiff's only remedy is to indict the deponent for perjury, if he dare." Odgers, Libel & Slander, p. 175, *pp. 191, 192.

The complaint before us does not charge that the allegations complained of, as found either in the offending complaint or in the affidavit, were not relevant and pertinent to the cause or subject there under inquiry. The very nature of that action invites the presumption that they were relevant and pertinent. Their relevancy and pertinency in that case constitute the one dominant, issuable fact in this case; not the truth, falsity, or maliciousness of the words. That dominant issue was not tendered by the complaint here involved. The demurrer admitted the truth only of the *material* allegations of the complaint. It did not admit the allegations of malice and falsehood, which were wholly immaterial without the further allegation of facts showing irrelevancy and impertinence.

The demurrer was properly sustained. The judgment is affirmed.

MOUNT, C. J., FULLERTON, MAIN, and MORRIS, JJ., concur.

[No. 10493. Department One. November 21, 1912.]

L. A. Wheeler *et al.*, *Appellants*, v. Hotel Stevens Company, *Respondent*.[1]

Carriers—Elevators—Injury to Passenger—Contributory Negligence—Instructions. It is contributory negligence, precluding any recovery for a fall down an elevator shaft, for the passenger to open the elevator door, which he found substantially closed, and step into the shaft for the purpose of taking the elevator without looking to see if it was there.

Trial—Instructions—Weight and Sufficiency of Evidence. Instructions basing the right of recovery entirely on belief in the plaintiff's version of a disputed fact are proper where there was direct conflict on an essential matter and no middle ground on which a verdict could be predicated.

Trial—Written Instructions—Necessity. When the parties stipulated that instructions might be partly oral and partly in writing, they may be so given.

Appeal—Review—Harmless Error—Instructions. It is not prejudicial error that instructions were given to the jury after the argument, in disregard of the statute.

Trial — Cautionary Instructions — Sympathy and Prejudice. Where there is a seeming necessity, the jury may be cautioned not to allow sympathy or prejudice to influence the verdict.

Trial—Instructions—Misleading Instructions. Instructions directing the jury to find the facts according to their conscientious belief are not misleading as addressed to their consciences rather than their minds.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 9, 1912, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries. Affirmed.

John E. Humphries, *L. N. Jones*, and *William A. Johnson*, for appellants.

James Kiefer, for respondent.

Gose, J.—The plaintiff wife stepped into an elevator shaft in the defendant's hotel and sustained a serious injury, for

[1]Reported in 127 Pac. 840.

which damages are sought in this action. The plaintiffs have appealed from an adverse verdict and judgment.

The facts are few and simple. The appellant wife and a friend testified, that they approached the elevator for the purpose of going to the room of the latter in the respondent's hotel; that the door of the elevator shaft was open; that the elevator was not there, and that the appellant, thinking that she was stepping into the elevator, stepped into the shaft without touching the door, and fell and was injured. The accident happened on the 3d day of August about midday, and she admits that the day was bright. There is no question of inadequate lights. The respondent's witnesses, including the elevator boy, testified that the door was not open to exceed one inch, and that the appellant could not have entered without opening it. They further testified that both the appellant and her friend stated immediately after the injury that the appellant opened the door.

The appellant assigns error in the refusal of the court to give a number of requested instructions. An examination of the record discloses that some of these instructions were given verbatim and that the others were given in substance. Error is assigned to the following instruction:

"If the jury finds from a fair preponderance of the evidence in the case that the plaintiff, Emma Wheeler, when she approached the passenger elevator maintained by the defendant in its hotel found the door of the elevator partly open and further opened the door for the purpose of stepping into said elevator, the plaintiff cannot recover, and the verdict should be for the defendant."

The instruction is not fortunate, but under the facts of the case, it was not erroneous. The door was either open so that the appellant entered without touching it, as she and her witnesses testified, or it was not open to exceed one inch, and she had to open it in order to enter. This view is supported by the following cases: *Bremer v. Pleiss*, 121 Wis. 61, 98 N. W. 945; *Mau v. Morse*, 3 Colo. App. 359, 33 Pac.

283; *Massey v. Seller*, 45 Ore. 267, 77 Pac. 397; *Ramsdell v. Jordan*, 168 Mass. 505, 47 N. E. 244.

In the *Bremer* case, upon similar facts, the court said:

"The facts as shown by his own evidence were that he was very familiar with the elevator, and knew that it was in a very dark place and was not lighted in the daytime; that he approached it, having in mind the question whether the car was there or not; that before stepping in he looked at the open hole, and saw no car, because it was dark; that the door was only partly open—about half-open—and that he pushed it open with his shoulders and stepped in; that only a few moments before he had stepped into the car through the door, which was then fully open. Upon these facts, is there a question for the jury? There is no doubt that, when a door to an elevator shaft is thrown open by the attendant, that very act constitutes an invitation to enter. *Tousey v. Roberts*, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. 655; *Oberndorfer v. Pabst, supra.* So it has been held that, where the door is fully open and the shaft is dark, the question whether a passenger is guilty of contributory negligence in stepping in without examination is one for the jury. *People's Bank v. Morgolofski*, 75 Md. 432, 23 Atl. 1027, 32 Am. St. 403; *Southern B. & L. Asso. v. Lawson*, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. 804; *Dawson v. Sloan*, 49 N. Y. Sup. Ct. 304, affirmed in 100 N. Y. 620. We have found no case, however, holding that where the door to the shaft is only halfway open, so that the passenger entering is obliged to, and does, open it the rest of the way in order to enter, the question of contributory negligence is a matter of doubt; nor do we see how it could be so held. It seems to us entirely clear that the fact that the door is only part way open is a definite and unequivocal advertisement that something is wrong—certainly not an assurance that the car is there."

If the appellant opened a substantially closed door for the purpose of entering the elevator, and stepped into the elevator shaft, she was so clearly guilty of contributory negligence that it would seem that the minds of reasonable men could hardly differ upon that question. The appellant relies upon the following cases: *Tousey v. Roberts*, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. 655; *People's Bank of Baltimore*

v. Morgolofski, 75 Md. 432, 23 Atl. 1027, 32 Am. St. 403; *Rhodius v. Johnson*, 24 Ind. App. 250, 56 N. E. 942; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153. In *Tousey v. Roberts*, a door to the elevator shaft was thrown open by one whom the plaintiff believed had authority to open it, and the question of the adequacy of the lights was in dispute. In *People's Bank of Baltimore v. Morgolofski*, the door to the shaft was open, and there was evidence that the light was inadequate. In *Rhodius v. Johnson*, and *McRickard v. Flint*, the door to the shaft was partly open, and there was evidence tending to show that there was nothing to indicate the presence of a shaft or an elevator. In each of these cases the plaintiff thought he was stepping into a room.

The court also instructed:

"And it is one of these peculiar cases where if you believe the evidence of the plaintiff in the case and do not believe the evidence of the defendant, the plaintiff would have to recover; and if you believe the evidence of the defendant and do not believe the evidence of the plaintiff, why then the defendant company would have to recover."

The suggestion that this was error as to the appellant is not meritorious. The instruction must be read in the light of the evidence. If the appellant's testimony is true, the door was open and she "walked right in" and "never touched the door at all." On the contrary, if respondent's evidence is true, it was practically closed and she opened it and then walked in. There was no middle ground in the testimony, and no fact or circumstance from which the jury might have inferred that the door was half or two-thirds open. It was either open or it was closed. The authorities cited by the appellant deal with a state of facts where each side might have been found to have been partly in the right and partly in the wrong. In such cases, indeed in most cases, the instruction would not be proper.

Exception is taken to the following instruction, given orally after the close of the arguments:

"Discuss this case just as you would if it was one woman suing another or one hotel suing another. Do not take into consideration anything of sympathy nor anything because one is severely injured and the other might or might not be able to pay. Discuss the facts, in other words, impartially and determine it as you would want an issue of like importance to yourselves determined by a jury fairly and upon the evidence as you conscientiously believe."

The parties had theretofore stipulated that the instructions might be "partly oral and partly in writing." *Raynor v. Tacoma R. & Power Co.*, 70 Wash. 133, 126 Pac. 91, is therefore distinguishable. Nor does the fact that the instruction was given after the argument and in utter disregard of the statute, make it prejudicial error. *Purcell v. Warburton*, 70 Wash. 129, 126 Pac. 89. The trial judge may, and where there is a seeming necessity should, caution the jury not to allow sympathy or prejudice to influence their verdict. Blashfield, Instructions to Juries, §§ 344, 345. It is argued that evidence is addressed to the minds of jurors and not to their consciences, and that the instruction was misleading. The purpose of the oath administered to a juror is to bind his conscience to return an honest verdict according to his judgment. The jury had been previously instructed on the law as to the burden of proof. As suggested by the respondent's counsel, the instruction in effect means that the jury should find the facts as they conscientiously believe them to have been established by the evidence.

The judgment is affirmed.

MOUNT, C. J. CROW, CHADWICK, and PARKER, JJ., concur.

[No. 10866. Department Two. November 22, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Jacob Furth et al., Plaintiff*, v. THE SUPERIOR COURT FOR SKAGIT COUNTY, *Respondent*.[1]

MANDAMUS—TO COURTS—WHEN LIES—CHANGE OF VENUE—REMEDY BY APPEAL. After the granting of a motion changing the venue to another county, mandamus does not lie to compel a modification of the order, changing the venue to another county; since error, if any, in the order can be reviewed on appeal from the final judgment, even if the orders were made by several judges or in several counties.

Application filed in the supreme court November 15, 1912, for a writ of mandamus to compel the superior court for Skagit county, Joiner, J., to modify an order for a change of venue. Denied.

Otto B. Rupp, E. C. Hughes, and *Harold Preston*, for relators.

Augustus Brawley, for respondent.

PER CURIAM.—Application for a writ of mandamus. Relators were charged with an offense in Skagit county. They filed a motion for a change of venue. This motion was granted, and the venue was ordered changed to Whatcom county. Thereupon relators filed a motion requesting the court to modify said order so that the venue might be changed to Snohomish county. This motion was denied, and relators now seek this writ.

We are of the opinion that the writ should not issue, for the reason that, if the court erred in refusing to send the case to Snohomish county, that error may be reviewed upon appeal from a final judgment in the case. The fact that this order was made by the court in Skagit county while final judgment may be rendered by the court in Whatcom county

[1]Reported in 127 Pac. 1107.

is of no importance, because an appeal from a final judgment searches the whole record of the case, whether made by more than one judge or in more than one county.

The writ is therefore denied.

[No. 10521. Department Two. November 22, 1912.]

F. W. RONKOSKY, *Appellant*, v. THE CITY OF TACOMA, *Respondent*.

JOHN HANNAM, *Appellant*, v. THE CITY OF TACOMA, *Respondent*.[1]

MUNICIPAL CORPORATIONS—STREAMS—OBSTRUCTION—DEFECTIVE CULVERTS—LIABILITY OF CITY. Where a fill and culvert is constructed across a natural water course, the city must make adequate provisions to care for the water of the stream, including ordinary freshets that could reasonably be anticipated, and is liable for damages to property where, after notice that the culvert had become inadequate through decay or obstructions, it failed to remedy the defect.

SAME—SURFACE WATERS—DRAINS—DUTY OF CITY. A city having constructed an adequate culvert to drain off surface water, must exercise reasonable care to maintain the same in a suitable condition to perform its function.

SAME—STREAMS — OBSTRUCTION — ACTION FOR DAMAGES — NEGLIGENCE—QUESTION FOR JURY. Where a city culvert became clogged up, obstructing a natural stream until buildings were floated in forty-five feet of water, allowing the water to go out with a rush when the city cut away a cribbing, demolishing the buildings, whether the city was negligent in causing the water to go out with unnecessary suddeness, and the damages suffered thereby, are questions for the jury.

Appeals from judgments of the superior court for Pierce county, Clifford, J., entered December 13, 1911, dismissing actions for injury to property, upon granting nonsuits. Reversed.

[1]Reported in 128 Pac. 2.

Frank S. Carroll, for appellants.

T. L. Stiles, *F. R. Baker*, and *Frank M. Carnahan*, for respondent.

ELLIS, J.—These two actions were, by stipulation of the parties, tried together. A motion for nonsuit was sustained as to each case; and from that order and judgments of dismissal thereon, the plaintiffs in both cases have appealed. By further stipulation, both cases are here for consideration upon the same statement of facts.

Where Steele street and North 29th street, in the city of Tacoma, intersect, there is a deep gulch, in the bottom of which flows a perennial stream, carrying a small amount of water in the summer time, but a much larger volume in the rainy season. Years ago, the city graded 29th street across the gulch by cribbing and filling it to a height of forty-five feet above the bottom of the gulch. A culvert was constructed beneath the fill sufficient to permit the passage of the waters of the creek, so far as the evidence shows, at all seasons. The appellant Hannam was the owner of a small dwelling house, barn, and woodshed, situated in the gulch a short distance above or up the stream from the fill. These buildings were constructed subsequently to the filling of the street. The appellant Ronkosky, as Hannam's tenant, occupied the premises at the time here in question. The evidence shows that, during recent years, the culvert, either by reason of decay or by its becoming partially obstructed, had ceased to carry the water as effectively as at first, so that at times of heavy rains the water would back up in the gulch to some extent, but not sufficiently to flood the buildings or cause damage. There was evidence from which it might reasonably be inferred that the culvert was in a state of decay, since witnesses testified that, several times during the three or four years immediately preceding the catastrophe, the fill above the culvert had sunken so as to necessitate filling with brush and sand in order to restore the grade of the street.

It further appears that the city had been notified that the culvert was becoming clogged, and that, some time before the catastrophe, there had been some talk of constructing a tunnel beneath the fill.

About November 20, 1910, there occurred a very copious rainfall, and the water began to accumulate in the gulch above the fill. The appellant Ronkosky set a stake and observed it for a time, but seems to have concluded that it would not rise to a sufficient height to flood the house. He and his family went to bed and, near midnight, were awakened by the noise of water about the house. He had barely time to escape with his wife and children before it was completely flooded. No part of his household goods was rescued, save the stove. By morning the buildings were all washed from their foundations and floating about in a lake of water forty-five feet deep. This condition continued for a week, when the city, in an effort to drain the pond, cut the cribbing at the lower side of the fill. The structure gave way, and the water went through with a rush, carrying the buildings with it and wrecking them. Ronkosky lost his tools, chickens, winter fire wood, family clothing, and household goods; Hannam, his buildings. Ronkosky had paid his rent for some four months in advance. He sued for this loss and the value of his property; Hannam, for the loss of his buildings. The negligence charged in each case was that the respondent city permitted the culvert to become clogged, thus causing the accumulation of water, and afterwards cut away the cribbing, causing the fill to give way; thus completely destroying the buildings and washing away the household goods, tools, and wood.

The respondent contends that these actions were properly dismissed under the "common enemy" doctrine of the common law as applied to surface water. It is urged that the decisions of this court, in *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. 859; *Harvey v. Northern Pac. R. Co.*, 63 Wash. 669, 116 Pac. 464, and *Wood v. Tacoma*, 66 Wash.

266, 119 Pac. 859, are determinative of the issue; and that, as a matter of law, the city was under no obligation to furnish drainage for surface water. For two good reasons the doctrine announced in those decisions has no application to the facts here presented.

(1) In the first place, when water, from whatever source, is collected into a natural stream or watercourse, where the drainage of the surrounding country has been accustomed immemorially to flow, it is no longer an outlaw or common enemy. Such a stream must be recognized as a permanent physical condition, with which no one may with impunity interfere to the detriment of another.

"And here it is important to distinguish between natural streams flowing in channels between defined and actual banks, and surface-water, caused by rain or melting snow; for the law relating to them is essentially different, and the powers of the municipality much greater with respect to the latter than the former. Assuming the stream to be of the former character, and that the municipality is without any valid legislative powers changing what would otherwise be the legal rights of the parties, its authorities under the general power to grade and improve streets, or construct public improvements beneficial to it, cannot deprive others of their legal rights in respect of the water-course, or injure the property of others by badly constructed and insufficient culverts or passageways obstructing the free flow of the water, without being liable therefor." 4 Dillon, Municipal Corporations (5th ed.), § 1731.

"In considering the liability of municipal corporations for injuries to private property in consequence of being overflowed with water caused by improvements made or work done upon streets under their authority, it is important to distinguish between natural streams flowing in channels between defined and actual banks, and surface water caused by rain or melting snow, for the law relating to them is very different, and the powers of the municipality much greater with respect to the latter than the former. Assuming the stream to be of the former character (a natural stream flowing in a channel between defined and actual banks as Righter Branch seems to have been), and that the municipality is

without any legislative powers, changing what would otherwise be the legal rights of the parties, its authorities under the general power to grade and improve streets, or construct public improvements beneficial to it, cannot deprive others of their rights in the water course, or injure them by badly constructed and insufficient culverts or passage ways, obstructing the free flow of the water without being liable therefor. Dill. on Mun. Corp., sec. 797 and cases cited. The rule is different as to surface water. Id., 798; *City of Little Rock v. Willis*, 27 Ark. 572." *Mayor etc. of Helena v. Thompson*, 29 Ark. 569, 574.

"And a contrary doctrine allowing towns to dam up and obstruct running streams by their highways, to the great injury, and perhaps absolute ruin of the adjoining owners, without compensation or liability, would be too monstrously unjust to be tolerated for a moment, and the unvarying practice and usage on the subject since the state was settled, show how the law has always been understood." *Haynes v. Burlington*, 38 Vt. 350, 360.

"A liability will also follow where a natural water course has been negligently obstructed or destroyed. . . . . The rule stated in the first of this paragraph equally applies to obstructing natural water courses by bridges or culverts." 3 Abbott, Municipal Corporations, pp. 2263, 2264.

See, also, *Mootry v. Town of Danbury*, 45 Conn. 550, 29 Am. Rep. 703; *Ross v. Madison*, 1 Ind. 281, 48 Am. Dec. 361.

Where a street is improved across such natural water course, it is incumbent upon the municipality not only to make an adequate bridge culvert, or passage for the water in the first instance, but to keep it in such condition that it shall not obstruct the stream thereafter. *Haynes v. Burlington, supra; Perry v. Worcester*, 6 Gray 544, 66 Am. Dec. 431; *Rowe v. Granite Bridge Corp.*, 21 Pick. 344; *Lawrence v. Inhabitants of Fairhaven*, 5 Gray 110-116.

Nor is this positive duty met by a provision merely adequate to take care of the water of the stream, at its lowest or even at its ordinary stages. Proper regard must be had to the volume of water, the strength and rapidity of the current at all seasons. While there is no liability for failure

to provide against unprecedented floods, ordinary freshets must be anticipated and provided for. *Perry v. Worcester, supra; Sprague v. Worcester*, 13 Gray 193; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *Dallas v. Schultz* (Tex. Civ. App.), 27 S. W. 292.

The evidence showed, and it seems to have been admitted, that the stream obstructed was a natural water course. While the rain was admittedly heavy, there was no evidence that it was unprecedented, or that it was such as should not have been reasonably anticipated in this climate. Though the appellant Hannam built his house, and the appellant Ronkosky moved into it, long after the fill and culvert were constructed, there was no evidence that the culvert was not adequate when constructed, nor when the house was built, to carry off all the water reasonably to be anticipated. There was, however, ample evidence from which a jury might have found that the city had notice of the supervening inadequacy of the culvert by reason of decay or obstruction, and wholly failed to remedy the defect. All of these were questions for the jury, and should have been submitted to it upon instructions embodying the foregoing principles of law.

(2) In the second place, the city, while under no primary obligation to furnish drainage for surface water, even if this stream could be considered surface water, had a discretionary power so to do. Having constructed this drain and undertaken the performance of this discretionary duty, the obligation to maintain the drain in a safe and suitable condition was no longer a matter of mere discretion. Though the city would not be liable for errors of judgment in adopting an inadequate plan or system of drainage, having once adopted an efficient plan and constructed an adequate drain, there arose the positive duty to exercise reasonable care to maintain its original efficiency.

"After the construction of drains and sewers, although originally this was a discretionary duty, yet, the obligation to maintain them in a safe and suitable condition is not one

of that character and the authorities must perform their duty in these respects or become liable for any injuries suffered. A municipal corporation cannot in respect to the construction or maintenance of a drainage or sewage system, especially in its discharge, create either a public or private nuisance. For the former, it is subject to indictment, in some jurisdictions, and for the latter, it will be liable for damages shown." 3 Abbott, Municipal Corporations, pp. 2233, 2234, 2235.

See, also, *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62; *City of Valparaiso v. Cartwright*, 8 Ind. App. 429, 35 N. E. 1051; *Louisville v. O'Malley*, 21 Ky. Law 873, 53 S. W. 287; *Mayor etc. of Brunswick v. Tucker*, 103 Ga. 233, 29 S. E. 701, 68 Am. St. 92.

In *Wood v. Tacoma*, *supra*, the case chiefly relied upon by the respondent, the city had never provided nor undertaken to provide any permanent system of drainage, nor was any natural stream or water course obstructed. The distinction from the case in hand is too obvious to require further comment.

As to the further claim of damage caused by the giving way of the fill, it seems to us that it was a consequence of the primary act of negligence in allowing the culvert to become clogged. In any event, whether the city was negligent in cutting away the cribbing, and whether that caused the water to go out with unnecessary suddenness and violence, and whether the appellants thereby suffered damages which proper care upon the respondent's part might have avoided, were all questions for the jury.

The judgments are reversed, and the causes remanded for further proceedings.

MOUNT, C. J., FULLERTON, MAIN, and MORRIS, JJ., concur.

[No. 10635. Department One. November 22, 1912.]

Ida M. Anderson, *Respondent*, v. Seattle Lighting Company, *Appellant*.[1]

Malicious Prosecution—Probable Cause—Advice of Counsel—Question for Court. A gas company is not liable for a malicious prosecution of the plaintiff for stealing gas, and a nonsuit should have been directed, where it appears that its inspector was informed by two neighbors that the plaintiff was stealing gas, that he made an inspection, and discovered an unlawful connection by which gas was being used without being registered, that plaintiff admitted the existence of the connection, that the inspector truthfully communicated all the facts and circumstances within his knowledge to the prosecuting attorney, who advised and conducted the prosecution of the plaintiff; since probable cause then became a judicial question for the court, and under the facts probable cause was established.

Same—Malice—Evidence—Sufficiency. In such a case, there is no sufficient evidence of malice, where it appears that neither the inspector nor any of the defendant's officers knew the plaintiff or had any previous acquaintance with her.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 27, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for malicious prosecution. Reversed.

H. R. Clise and *C. K. Poe*, for appellant.

Will H. Merritt and *John E. Humphries*, for respondent.

Crow, J.—This action was commenced by Ida M. Anderson against Seattle Lighting Company, to recover damages for malicious prosecution. From a judgment in her favor, defendant has appealed.

Numerous assignments of error are presented, a number of which would require a reversal, but we will only consider appellant's contention that the trial court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict. The following undisputed facts are

[1]Reported in 127 Pac. 1108.

disclosed by the evidence: The appellant is a public service corporation, engaged in the business of supplying gas for lighting and heating purposes. Respondent conducted a lodging house in Seattle which appellant supplied with gas. For many years one Victor Carson had been employed by appellant as an inspector, and at times was engaged in removing prepayment meters which had been prohibited by city ordinance. While thus engaged, he visited the house of one of respondent's neighbors, a Mrs. Cord, who protested against the removal of her meter and informed him that respondent was stealing gas. Thereupon Carson inspected respondent's premises, and discovered that appellant's service pipe had been connected with another pipe in such a manner that gas which did not pass through the meter could be used in several rooms. Respondent did not deny the discovery or existence of the unlawful connection, but told Carson she did not know of its installation, and insisted that the pipes were in the condition they were when she leased the premises. Carson then visited another neighbor, a Mrs. Rosebush, who also told him that respondent was stealing gas; that respondent's brother told her he had made the unlawful connection for respondent, and that he offered to change the pipe in Mrs. Rosebush's house so that her gas bill would be decreased as respondent's had been. Having found the unlawful connection, and believing the statements of the two neighbors, Carson reported these facts to appellant's attorneys, who advised him to present them to the prosecuting attorney. This he did in the presence of appellant's attorneys. The prosecuting attorney thereupon advised a criminal prosecution. Carson verified a complaint, respondent was arrested, trial was had before a justice of the peace, and the action was dismissed. Thereupon respondent commenced this action.

In an action for damages for malicious prosecution, the burden devolves upon the plaintiff to show, that he has been acquitted of the charge or that it has been finally dismissed;

that, at the time the prosecution was commenced, probable cause did not exist; and that the prosecution was malicious. It is undisputed that the criminal prosecution was terminated in respondent's favor, and the only questions now to be considered are whether there was probable cause for the prosecution, and whether malice on appellant's part has been shown. It may be seriously questioned on the evidence before us whether the act of Victor Carson in making the complaint was authorized or ratified by the appellant corporation; but, for the purposes of the present inquiry, we will assume his acts in that regard were the acts of the corporation, for which it might be held liable if the prosecution was malicious and without probable cause.

The rule is well settled by the great weight of authority that, when a prosecuting witness truthfully, fairly and fully presents to a competent practicing attorney all facts within his knowledge, and the attorney on consideration thereof advises a prosecution, such advice will protect the prosecuting witness from liability in an action for malicious prosecution, and that it will be held that probable cause existed. This must be so, for if a citizen who has just cause to believe, and honestly does believe, that a crime has been committed, after taking such precautions, cannot be protected from liability for damages, it would follow that a conviction would have to be guaranteed in every criminal prosecution, and that the criminal law would in many instances fail of enforcement. The criminal law should be enforced in order that peace and good order may be preserved. By reason of these considerations, actions to recover damages for criminal prosecution are not favored by the courts, although they are, and should be, sustained when want of probable cause and malice are clearly shown.

In *Simmons v. Gardner*, 46 Wash. 282, 286, 89 Pac. 887, we said:

"Although it is conceded that the respondent was arrested at the instance of the appellants, and that he was afterwards

finally discharged, the burden is on him to further show that the criminal prosecution was instituted (1) without probable cause, and (2) with malice. Both of these elements must exist as a condition precedent to a recovery by him. Want of probable cause without malice is of no avail; nor will malice of itself be sufficient if probable cause be shown. It therefore follows that if probable cause did exist in this case, the respondent can in no event recover."

In the same case we quoted with approval the following language from *Anderson v. Friend*, 85 Ill. 135, which is especially pertinent here:

"It has been uniformly held that, where the prosecutor fairly presents all the facts to a respectable practicing attorney, who, from such a statement of facts, advises they are sufficient to warrant a prosecution, the prosecutor is protected against a suit for malicious prosecution, and, from the very nature of our criminal laws, it must be so, otherwise there would be no safety in originating such proceedings. But few persons outside the profession can determine, in many cases, whether the facts will justify a criminal conviction; but it is to be presumed that all respectable attorneys in full practice do know, and it is their duty to fairly and honestly advise in these as in all other cases; and if a prosecutor may not safely act upon such advice, then he has to almost guarantee a conviction when he starts a prosecution. The criminal law must be enforced, and human agencies must be employed for the purpose, and the law wisely protects all persons who in good faith act on reasonable presumptions of the guilt of the accused; and where the prosecution is commenced on the advice of respectable counsel, after fairly presenting to his consideration all the facts, and he advises that they are sufficient, it cannot be held the prosecution is groundless and there is a want of probable cause."

If Carson truthfully communicated to appellant's attorneys and to the prosecuting attorney all facts and circumstances within his knowledge, then the issue of the existence or nonexistence of probable cause was a judicial question for the court. If, on the other hand, any issue of fact existed, under all the evidence, as to whether he did truthfully and

fully communicate all the facts to the attorneys, then such issue of fact should have been submitted to the jury with proper instructions, as to what facts would, and what facts would not, constitute probable cause. *Simmons v. Gardner, supra.*

The facts above stated were truthfully and fully communicated to the attorney by Carson. They tended to show, that gas was being used by respondent for which she was not compensating appellant; that it was being done through an existing unlawful connection, without being registered by appellant's meter; that neighbors advised Carson the gas was being stolen; that, as the result of such information, he discovered the unlawful connection, the existence of which respondent admitted, when discovered, although she then insisted that she had no knowledge of its existence. These facts were communicated to the attorneys and it would seem from such statements that appellant and the attorneys had good ground for believing the law had been violated. The attorneys were not bound to ignore the fact that respondent was using gas which did not pass through the meter, nor were they compelled to discredit the statements of appellant's trusted employees or the statements of the two neighbors who had given him the information which led to the discovery, and upon which he acted.

Respondent insists that Carson did not make a full, complete, and truthful statement, to the prosecuting attorney of all facts that had come to his knowledge, or of all information that he had obtained. In support of this contention it is insisted that Carson stated he had examined respondent's premises about one year previous to his discovery of the unlawful connection, and that no such connection then existed. There was evidence that the meter was installed in a hall upon respondent's premises, and that the unlawful connection passed through the wall to an adjoining room and to a pipe which supplied nonregistered gas to several rooms. Respondent produced witnesses who testified that the gas pipe,

not the one in the hall, but the one which passed through the rooms, was in full view where it had been continuously from the time respondent leased the premises. They did not testify that the unlawful connection which supplied nonregistered gas had to their knowledge been located in the hall. To have so testified would have amounted to an admission that respondent was knowingly availing herself of its use. There was further evidence offered by respondent which she claims shows that Carson on a previous trial had testified that the pipe in the rooms was not there one year previous to respondent's arrest; but it is manifest that he then testified that the unlawful connection in the hall near the meter was not installed at that time. Taking the entire evidence into consideration, it is apparent, and not successfully disputed, that Carson fairly and truthfully stated to the attorneys all facts then known to him, that he proceeded with caution, and that on the information given the prosecuting attorney advised the criminal prosecution. Under the rule announced in *Simmons v. Gardner*, and other cases therein cited, this made the existence or nonexistence of probable cause a question of law for the court; and passing upon that question, we hold that probable cause existed, and that the appellant should be protected from liability, having acted on the advice of competent legal counsel.

We are further compelled to hold that no malice was shown. Respondent testified that she never saw or knew Carson until he called her attention to the unlawful connection, and that she saw him but once thereafter prior to her arrest. None of the appellant's officers knew respondent, and the record is devoid of evidence of malice on the part of Carson, or any employee of appellant. Even though the evidence had been sufficient to make a *prima facie* showing of want of probable cause, yet in *Ton v. Stetson*, 43 Wash. 471, 86 Pac. 668, speaking of malice, we said:

"While it is true that in some cases, where the evidence is sufficient to show a want of probable cause, malice may be

inferred, it is not an invariable rule that it must necessarily be inferred. It would be a harsh rule to hold that, where the evidence was merely sufficient to make a *prima facie* showing of want of probable cause, malice must necessarily be inferred therefrom. If, in connection with the *prima facie* showing of want of probable cause, affirmative acts of the respondent had been shown disclosing the least feeling of bitterness, animosity or vindictiveness towards the appellant, then it might be that an inference of malice would be justified sufficiently to require the denial of a nonsuit. In this case there is an utter absence of any such showing. The parties were not acquainted with each other even in the slightest degree."

On the record before us we find no evidence which would sustain a finding of malice. The motions for a directed verdict and for judgment notwithstanding the verdict should have been sustained.

The judgment is reversed, and the cause remanded with instructions to dismiss.

MOUNT, C. J., CHADWICK, PARKER, and GOSE, JJ., concur.

[No. 10634. Department One. November 22, 1912.]

IDA M. ANDERSON, *Respondent*, v. SEATTLE LIGHTING COMPANY, *Appellant*.[1]

APPEAL—DECISION—REMAND. Upon reversing a case for error in admitting evidence which goes only to the amount of the verdict and not to the right of recovery, and the proper amount can be determined from the record, a new trial will not be awarded, but the judgment will be modified, with costs to appellant.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 27, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action of tort. Modified.

[1]Reported in 127 Pac. 1108.

H. R. Clise and *C. K. Poe*, for appellant.

Will H. Merritt and *John E. Humphries*, for respondent.

CHADWICK, J.—This action was brought against the appellant to recover damages alleged to have been suffered by respondent in her business as a lodging-house keeper. It is charged that defendant arbitrarily cut off her supply of gas, to her damage in the sum of $364. A verdict for $240 was returned by the jury. A review of the facts would serve no purpose. If curiosity impels, they may be found by referring to the case of *Anderson v. Seattle Lighting Co.*, *ante* p. 155, 127 Pac. 1108. It is enough to say that there is evidence to sustain the finding of the jury, that the gas was arbitrarily cut out of respondent's house, although the company acted under a mistake of fact. There is also testimony to sustain respondent's assertion that she was willing to pay arrearages but that appellant never fixed the amount due. Under the testimony of respondent herself, the greatest damage proved, and all that she could claim under a ruling of the court made upon the trial and under his instructions, was $50 a month. Respondent was deprived of the use of gas for seventy-one days. She is, therefore, entitled to recover $118.33.

The court allowed counsel for the respondent to bring out the fact that appellant had had respondent arrested for stealing gas. This was wrong, and must have been highly prejudicial, as evidenced by the verdict; but inasmuch as the error goes only to the amount of the verdict and not to the right of recovery, and the actual damages, if any, may be ascertained from the record, we shall not reverse the case for a new trial, but remand it with instructions to enter a judgment in favor of respondent for $118.33. Appellant will recover costs in this court.

MOUNT, C. J., CROW, PARKER, and GOSE, JJ., concur.

[No. 10593. Department One. November 22, 1912.]

CARL KEIL *et al.*, *Respondents*, v. GRAYS HARBOR & PUGET SOUND RAILWAY COMPANY, *Appellant*.[1]

EMINENT DOMAIN—DAMAGE TO PROPERTY—STEAM RAILROAD IN STREET. The building and operation of a steam railroad in a street under a city franchise is a damage to abutting property, within Const., art. 1, § 16, providing that no private property shall be taken or damaged for public or private purposes without just compensation.

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS—EXCEPTIONS. Error cannot be predicated on improper testimony, admitted without objection or exceptions to instructions given or refused.

EMINENT DOMAIN—DAMAGES RECOVERABLE. Damages to abutting property by reason of the construction of a steam railroad in a city street must be confined to such physical injury as will depreciate its value at the time of the taking; danger from fire being only an element in so far as it depreciates value.

SAME—ACTION FOR DAMAGES—DEFENSES—PERSONS LIABLE. In a common law action for damages to abutting property by the construction of a steam railroad in a city street, tried as a condemnation case with a judgment in that form, the damages being the same as in a condemnation suit which defendant should have commenced before the unlawful entry, the defense cannot be made that the injury was committed by the defendant as a construction company which built the road and has since transferred it; since defendant was a trespasser.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 23, 1912, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages to real property. Affirmed.

Bridges & Bruener (*Bogle, Graves, Merritt & Bogle*, of counsel), for appellant.

A. M. Abel and *W. H. Abel*, for respondents.

CHADWICK, J.—The main question in this case is whether the building and operation of a steam railroad along a city

[1]Reported in 127 Pac. 1113.

street is such an additional burden to the highway as to entitle an abutting owner to recover damages under art. 1, § 16, of the state constitution, providing that "no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner." The railroad was built under and in conformity with a franchise, regularly granted by the town council of the town of Cosmopolis, and it is earnestly contended that the statutes (Rem. & Bal. Code, §§ 7507-sub. 9, 7510, 7612-sub. 40, 7685-sub. 13, 7731-sub. 13), having given authority to a municipality to grant franchises for railroads and street railways, no damages can be claimed by an owner of abutting property whatever the character of the burden may be.

The law seems to be well settled that no damages can be claimed by an abutting owner for or on account of the location of a street railway, when constructed in the usual way, and appellant contends that it must follow that none can result because of the location of a steam railroad, for the difference in the damage, if any, is in degree and not in kind.

Appellant insists that this court has never held that damages could be claimed on account of a steam railroad, while respondent contends with equal zeal that the question has been foreclosed by a long line of decisions, citing: *Hatch v. Tacoma, Olympia & Grays Harbor R. Co.*, 6 Wash. 1, 32 Pac. 1063; *Kaufman v. Tacoma, Olympia & Grays Harbor R. Co.*, 11 Wash. 632, 40 Pac. 137; *Patton v. Olympia Door & Lumber Co.*, 15 Wash. 210, 46 Pac. 237; *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362; *Smith v. St. Paul, M. & M. R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. 889, 70 L. R. A. 1018; *Lund v. Idaho & Washington N. R.*, 50 Wash. 574, 97 Pac. 665, 126 Am. St. 916.

Appellant admits the authority of the earlier cases, *Hatch v. Tacoma, Olympia & G. H. R. Co.*, *Kaufman v. Tacoma,*

Olympia & G. H. R. Co., and *Patton v. Olympia Door & Lumber Co.*, but undertakes to show that they were made to depend upon a charter provision of the city of Olympia, which provided that no railroad track should be laid in a street until the damages to abutting property had been ascertained and paid. While it is true that there was such a charter provision, it is likewise true that the charter provision was but declaratory of the constitutional guarantee and the general rule of law. A careful review of the decisions of this court convinces us that, although it may be that the court has not in words so declared, it has nevertheless so far committed itself to the prevailing rule that it may be taken as settled in this state.

In *State ex rel. Ford v. Superior Court*, 67 Wash. 10, 120 Pac. 514, the relative burdens of a street railway and a steam railroad were noticed and defined. It is there said: "It is, of course, not questioned that street railways facilitate street travel, and that commercial railways are not designed or operated for that purpose." The reason sustaining the doctrine which denies a recovery where the added burden is a street railway is that a street railway is in aid of the ordinary uses of a street, while a steam road tends to hinder the public in such use, and because of the difference in methods of operation, the steam road adds inconvenience and damage to the use of abutting property.

We shall not review the many cases cited by appellant or the arguments which are made to depend thereon. The cases are divided, but the division is not so general as it might seem. Under a constitutional provision calling for compensation where property is taken or damaged and where the fee of the street is in the abutting owner, as it has been held in this state, the cases are practically unanimous. The subject is discussed and the cases are collected in: 1 Lewis, Eminent Domain (3d ed.), §§ 151-153; 15 Cyc. 670, 672; 1 Am. & Eng. Ency. Law (2d ed.), 227; 27 Am. & Eng. Ency. Law (2d ed.), 180.

Some point is made that improper testimony was admitted. If so, it was admitted without objection, and no exceptions were reserved by appellant to the instructions given or refused. However, the record shows that this is one of several cases of like nature, and it may not be out of place to say that a claimant cannot recover except for such physical injury to the property, present or continuing, as will depreciate its value at the time of the taking or damaging. A danger from fires because of the close proximity of the railroad is only an element of damage in so far as it depreciates value, and the court should so instruct the jury that there will be no danger of anticipating actual damage by fire. The reason is obvious. The company is bound to operate its trains without negligence, and is liable for its negligence and for its consequences at the time such negligence occurs. To allow any other rule would be to invite speculative damages.

The point is made that the injury, if any, was done by the Grays Harbor & Puget Sound Railway Company; that it was a building corporation and has since transferred the road to an operating corporation; that its liability, if any, is that of a trespasser, and that it cannot be held to the payment of damages resulting in consequence of operation. In this case plaintiffs did not seek injunction, but brought a common law action. The result is the same. The case was tried as a condemnation suit, and the judgment is in form a judgment of condemnation. Appellant's reasoning is plausible but not sound. Appellant was a trespasser, and has prepared the property for, if it has not actually put it to, a public use. If it had observed the requirements of the constitution and followed the statute, it would have been called on to meet the damages it now seeks to avoid; consequently, it is in no position to urge this defense.

"If the entry has been made without complying with the statute and preliminaries, it is wrongful, and the owner has his common law remedies for redress;" 2 Lewis, Eminent Domain

(3d ed.), §§ 872, 890; or may enjoin the trespass pending condemnation. *Lund v. Idaho & Washington N. R.*, 50 Wash. 574, 97 Pac. 665, 126 Am. St. 916. In other words, the remedy is commensurate with the wrong, and is measured as of the time the right is invaded. Aside from the proper elements of damages, a denial of ownership is about the only defense open to a trespasser. It is certain that a trespasser cannot justify a continuing trespass committed in violation of art. 1, § 16, of the constitution, by pleading title in his grantee. Mr. Lewis, in his valuable treatise on the law of Eminent Domain, does not doubt the right of the owner to recover against the original trespasser or condemner who has not paid the damages, his only doubt being whether its grantee would be subject to a personal remedy. Appellant could not discharge its obligation by a transfer of the property. The probable effect of the deed was to make its grantee likewise liable to respondent, since it has put the property to the intended uses. 2 Lewis, Eminent Domain (3d ed.), § 887.

The judgment of the lower court is affirmed.

MOUNT, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 10556. Department One. November 25, 1912.]

THOMAS F. MARKS, *Respondent*, v. ALASKA STEAMSHIP COMPANY, *Appellant*.[1]

CARRIERS—ASSAULT ON PASSENGER—LIABILITY FOR ACTS OF SERVANT—DEFENSES—ACTS OUTSIDE SCOPE OF EMPLOYMENT. A passenger on a ship is entitled to absolute protection from assaults by employees, and the carrier cannot plead that the servant acted outside the scope of his employment.

SAME—DEFENSES. Where an employee and a passenger on a ship engaged in a fight, and later the employee returned and renewed the

[1]Reported in 127 Pac. 1101.

assault after being ordered below, the carrier is liable for the injuries then inflicted, and cannot plead as a defense that plaintiff voluntarily engaged in the encounter.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 29, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action by a passenger on a boat for an assault and battery by an employee. Affirmed.

Bogle, Graves, Merritt & Bogle, for appellant.

Wm. Parmerlee and *P. D. Hughes*, for respondent.

CHADWICK, J.—Plaintiff was a passenger on one of the defendant's boats plying between the city of Seattle and Alaska ports. One Hardy was an employee of the defendant company, a steerage waiter. Plaintiff and Hardy had some words in the first-class smoking room of the ship, followed by an assault on Hardy's part. Plaintiff was painfully and possibly seriously hurt. The combatants being separated by the purser of the ship, Hardy was ordered below and plaintiff admonished to go below and have his wounds dressed. After some demur, he started to go out of the saloon, when he was met by Hardy, who had threatened to return and "get" him, and was by him assaulted with an iron rod about two feet long and of the size of a man's finger. From a verdict in favor of plaintiff, defendant has appealed.

Motions for a directed verdict and a new trial were interposed, and their disposition is assigned as error. Inasmuch as these rulings depend upon a discussion of the two remaining assignments, they will not be further noticed. It is first contended that, inasmuch as Hardy was out of his place, that is, not engaged at the time in the performance of the particular duties to which he was assigned, the company is not liable; and further that, if Hardy was not engaged in the discharge of any of his duties and acted towards plaintiff "through malicious or vengeful feelings, the company is not liable unless it or its officers failed to afford the plaintiff

proper protection after receiving knowledge of the assault upon him, or had reasonable opportunity to receive such knowledge;" or, in other words, the appellant is only liable in case it was negligent in affording protection to the passenger after the assault was made, it being admitted that the particular duties assigned to Hardy did not take him to the smoking room occupied by first class passengers. Appellant admits that:

"As against the assaults and violence of his servants, the passenger has the right to claim an absolute protection, and the carrier will undoubtedly be held responsible for any unnecessary personal abuse or violence of which they may be guilty in their treatment of the passenger whilst engaged in the discharge of their assigned and appropriate duties, although such abuse may consist in an assault or battery upon the person of the passenger, and may be wholly unauthorized by the carrier and prompted by the vindictive feelings of the servant towards the passenger." 2 Hutchinson, Carriers (3d ed.), § 1093.

It is undoubtedly the rule that a carrier is ordinarily not responsible for the tortious acts of his servants unless the servant is engaged in the contract of carriage; or, as said above, "in the discharge of their assigned and appropriate duties;" but we cannot hold that the testimony brings appellant within the rule just quoted. Hardy was a servant upon the ship, and it was his duty at all times to treat the passengers with respect. Appellant by the act of employment vouched for his deportment during the voyage. A carrier owes a duty to every passenger to protect him from insult and assault. It is a part of the contract of carriage. *Caldwell v. Northern Pac. R. Co.*, 56 Wash. 223, 105 Pac. 625. As long as respondent was a passenger on appellant's ship, appellant owed him a duty of absolute protection from the assaults and aggressions of its servants, and the rule is well-nigh universal that the carrier cannot plead as a defense that the servant acted outside of the scope of his employment.

"Unwarrantable assaults upon passengers by the servants of the carrier are breaches of the implied contract of the carrier to convey the passenger *safely* to his destination, and, as such, impose a liability upon the carrier to pay damages. The principles of law applicable to the relations of master and servant do not fully define the rights, duties and obligations of carriers toward their passengers. They are not merely citizens, bearing towards each other merely the relations which one citizen bears to another. The carrier agrees to carry for hire the passenger from one place to another, and is responsible for any breach of the obligation thus assumed, in ill-usage of the passenger by himself or his employees. Passengers contract not only for room and transportation, but for good treatment, and it is the duty of the carrier to use due care and exertion to protect them from any degree of violence, abuse, or ill-treatment from other passengers, or the carrier's servants, or other persons coming on board during the trip." 3 Thompson, Law of Negligence, § 3184.

See, also, Id., §§ 3186, 3187; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Shelby v. Metropolitan St. R. Co.*, 141 Mo. App. 514, 125 S. W. 1189; *Hayne v. Union St. R. Co.*, 189 Mass. 551, 76 N. E. 219, 109 Am. St. 655, 3 L. R. A. (N. S.) 605; *Dwinelle v. New York, C. & H. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 17 Am. St. 611, 8 L R. A. 224; *Taillon v. Mears*, 29 Mont. 161, 74 Pac. 421; *St. Louis Southwestern R. Co. v. Johnson*, 29 Tex. Civ. App. 184, 68 S. W. 58; *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Birmingham R. & Elec. Co. v. Baird*, 130 Ala. 334, 30 South. 456, 89 Am. St. 43, 54 L. R. A. 752; and Hutchinson, Carriers, § 1093; Wyman, Public Service Corporations, § 935; Moore, Carriers, p. 831, where the adjudged cases are collected.

The next objection is that respondent voluntarily engaged in a fight with Hardy, and that a voluntary combatant must bear the consequences of his indiscretion. The testimony—and we have only the evidence submitted by the respondent to consider—is conflicting upon this point. The jury must have found that it was not so; but whether true or not, we

think the fact that the servant returned and renewed the assault after being ordered below by the purser furnishes ample grounds upon which to rest the verdict.

Judgment affirmed.

MOUNT, C. J., CROW, PARKER, and GOSE, JJ., concur.

[No. 10529. Department One. November 25, 1912.]

EMPIRE STATE SURETY COMPANY OF NEW YORK, *Respondent*, v. MORAN BROTHERS COMPANY, *Appellant*.[1]

INSURANCE — INDEMNITY INSURANCE — POLICIES — CONSTRUCTION — "KIND OF TRADE OR BUSINESS" — "KIND OF WORK" — EMPLOYEES INCLUDED. A policy of indemnity insurance giving an employer compensation for injuries to servants whose compensations are included in the schedule on which the premiums are based, liberally construed in favor of the insured, includes under the heads of the schedule "Kind of trade or business" and "Kind of Work" all who were engaged in the prosecution of the work at the specific places, and should not be restricted to the specific classes of artisans, as "ship builders," "blacksmiths" etc.; and also includes employees of a power, heat and light department, operating the entire plant; also, timekeepers whose duties took them about the places described, and drivers who were working about the premises part of the time, where the policy expressly excepted only the "Pres., Vice-Pres., Secty., Treas., & Clerical force."

INTEREST—ON BALANCE DUE ON CONTRACT—RECOVERY—DISPUTE AS TO AMOUNT. Interest is recoverable on earned premiums on an indemnity policy, from the date the balance becomes due, although the legal basis for the recovery was a subject of controversy; since the amount was due on a specific contract for the payment of money and was determinable by computation.

COSTS—PREVAILING PARTY—SEPARATE CAUSES OF ACTION—APPORTIONMENT OF COSTS. The plaintiff, as prevailing party, is entitled to costs, under Rem. & Bal. Code, § 476, although one of its three causes of action failed and defendant secured therein an offset against the amount due on the other causes of action; there being no statute authorizing apportionment of costs in such cases.

[1]Reported in 127 Pac. 1104.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 16, 1911, upon findings in favor of the plaintiff, in an action to collect premiums on policies of indemnity insurance, after a trial on the merits to the court. Affirmed.

Wright & Kelleher and *Edward W. Allen*, for appellant.
Murphy & Wall, for respondent.

PARKER, J.—This is an action to recover a balance claimed to be due as premium upon three insurance policies, issued by the plaintiff to the defendant, indemnifying the latter against loss from liability imposed by law upon it for damages on account of injuries or death suffered by its employees. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

The questions involved have to do largely with the construction of those provisions of the policies which provide the measure for the amount of premium earned by respondent to be paid as the consideration for the indemnity furnished during the life of the policies. The facts bearing upon this principal question are not in dispute, and may be summarized as follows: Appellant, at the times here involved, was engaged in repairing and constructing ships and other water craft, and maintained a large plant for that purpose at Seattle. In connection with and as a part of its plant, it maintained a sawmill, planing mill, lumber yard, machine shop, pattern shop, foundry, boiler shop, pipe shop, and a general light and power plant which furnished light and power for the whole plant. All of these were maintained in comparatively close proximity to each other, though they were separated either by walls or by being in different buildings. They were all mutually dependent upon each other, and were operated to one common end, that is, the building and repairing of ships and water craft. The policies here involved are numbered 3165, 3166, and 3167, respectively. All of them

became effective on May 4, 1905, and all of them expired on May 4, 1906. The amount of premium to be paid in consideration of the indemnity furnished by these policies was by their terms based upon the entire amount of the compensation paid by appellant to its employees, whose injuries or death appellant was indemnified against during the life of the policies. Hence, the amount of premium earned could not be finally determined until the expiration of the term. Because of this, the sums paid upon the premium at the time of the issuance of the policies were by their terms regarded only as tentative estimates of the amounts of the premium to be earned. It is to recover a balance claimed to be due upon premium so earned that this action was commenced and prosecuted. The provisions of policy No. 3165, bearing upon the question of the amount of premium earned thereunder, are as follows:

THE EMPIRE STATE SURETY COMPANY, hereinafter called the Company, hereby agrees to indemnify *Moran Bros. Company*, hereinafter called the Assured, for a period of *12* months, beginning on the *fourth* day of *May, 1905*, noon, and ending on the *fourth* day of *May, 1906*, noon, standard time at the place where this Policy has been countersigned,

AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED, For damages on account of bodily injuries or death, accidentally suffered while this Policy is in force, by any employee or employees of the Assured, while within the factory, shop or yard described in the Schedule, or upon the sidewalk or other ways immediately adjacent thereto provided for the use of such employees or the public, in and during the operation of the trade or business described in the Schedule, including, however, drivers and drivers' helpers mentioned in the Schedule when on duty in the vicinity of the locations designated in the Schedule, subject to the following conditions: . . . . .

Condition B. This Policy does not cover loss from liability for injuries or death to or caused by—(1) Any person unless his compensation is included in the estimate set forth in the Schedule, . .

Condition J. The premium is based on the entire compensation whether for salaries, wages, piecework, overtime or allowances earned by the employees of the Assured during the period of this Policy; whenever employees are compensated, in whole or in part, by store certificates, board, merchandise, credits, or any other sub-

stitute for cash, the amount of compensation covered by such substitutes shall be included in the entire compensation on which the premium is based. If such entire compensation exceeds the sum set forth in the Schedule, the Assured shall immediately pay the Company the additional premium earned; if such compensation is less than the sum set forth in the Schedule, the Company will return the unearned premium, when determined; . . . .

SCHEDULE.

The places where the factories, shops and yards are located, the kind of trade or business carried on at each such location, and the estimated number of employees, and the estimated compensation of employees at each such location, are as follows:

Kind of trade or business.	Location of each factory, shop and yard.	Estimated average number of employees.	Estimated compensation for period of policy.	Premium rate per $100 of compensation.	Estimated amount of premium.
Saw Mill Planing Mill and Lumber Yard (Including Drivers & Drivers' Helpers).	*Seattle, Wash.*	*35*	*$16,000*	*98c*	*$156.80*
		65	*30,000*	*55c*	*165.00*

The estimated compensation includes that of all persons employed whether compensated by salary, wages, for piecework, overtime or allowances and whether paid in cash, in whole or in part, in board, store certificates, merchandise, credits, or any other substitute for cash, at the above locations, for the purposes of the trade or business described herein to whom compensation of any nature is paid, including President, Vice-President, Secretary, Treasurer, Clerical Force and Drivers, except as follows:
Pres., Vice-Pres., Secty., Treas. & Clerical force.

The provisions of policy No. 3166, bearing upon the amount of premium earned thereunder, are the same as in policy No. 3165, except the tabulated portion of the schedule, which is as follows:

Kind of trade or business.	Location of each factory, shop and yard.	Estimated average number of employees.	Estimated compensation for period of policy.	Premium rate per $100 of compensation.	Estimated amount of premium.
Boiler Makers, Ship Builders & Blacksmith (Shop only)	*Seattle, Wash.*	*250*	*$100,000*	*73c*	*$730.00*
Machine Shop, Pattern Shop, and Foundry		*180*	*90,000*	*44c*	*396.00*
					$1,126.00

The provisions of policy No. 3167, bearing upon the amount of premium earned thereunder, are in substance the same as in policy No. 3165, except the tabulated portion of the schedule, which is as follows:

Kind of work.	Place where work is to be done.	Estimated average number of employees.	Estimated compensation for period of policy.	Premium rate per $100 of compensation.	Estimated amount of premium.
Shipwrights	*Seattle, Wash.*				
Repairing vessels.	*Puget Sound and vicinity.*	*125*	*$50,000*	*93c*	*$465.00*
Ship Builders Operating dry docks and repairing of vessels and construction of floating dry docks		*30*	*15,000*	*1.33*	*196.50*
		20	*10,000*	*1.33*	*133.00*
					$797.50

The above quotations are taken from the printed portions of the policies, except that the words and figures which we have italicized appear in the policies in typewriting.

The main question in the case, the solution of which will largely control the amount of the premiums earned under the policies, is, Do the words of the schedules under the heads "Kind of trade or business," and "Kind of work," refer generally to the nature of the work carried on at the places designated, so as to include all who are there engaged in the prosecution of the work; or are those words used only as names of specific trades, so as to confine their meaning to specific classes of artisans or workmen there employed. The trial court adopted the broader meaning; that is, that the words of the schedules under these heads refer to all who were employed in or about the work, trade, or business at the places designated, regardless of the particular kind of mechanics or artisans there employed; and computed the amount of earned premium upon the total compensation of all persons so employed. This view counsel for appellant contends is an erroneous construction of the language of the policies.

It seems to us that there is but little ground for arguing against the construction given to the policies by the trial court, in so far as the question involved has to do with the schedule designations of "saw-mill," "planing-mill," "lumber yard," "machine shop," "pattern shop," "foundry," and "operating dry docks." These schedule designations, it seems clear to us, do not limit the basis for computing earned premium to the amount of compensation of any particular class of workmen, but there is included therein all who are engaged in and about the work carried on in these several mills, shops, and places. The correctness of the trial court's construction of the policies is not so readily apparent in dealing with such schedule designations as "boiler makers," "ship builders," "blacksmiths" and "shipwrights." These words standing alone may seem to furnish good ground for

counsel's contention against the view adopted by the trial court; but they are to be viewed in the light of all the provisions of the contract in which they are used. We have noticed that appellant is indemnified against injuries or death suffered by "any employee or employees of the assured while within the factory, shop or yard described in the schedule;" that the basis for computation of premiums earned is the total compensation of all employees whose injuries or death appellant is indemnified against; that the schedule is headed "the place where the factories, shop or yards are located, the kind of trade or business carried on at each such location;" and finally that "the estimated compensation includes that of all persons employed . . . except as follows: pres., vice-pres., secty., treas., and clerical force;" the exception, as we have noticed, being in typewriting in each policy. It is worthy of particular notice that these excepted officers and employees are taken from a seeming all-embracing described class.

Reading the policies as a whole, and having in view the evident purpose of the contracts evidenced thereby, we are of the opinion that the learned trial court properly construed their provisions in determining the basis for computing the amount of premiums earned. We believe the general rule, calling for a liberal construction of insurance policies in favor of the insured, warrants the construction adopted by the trial court, having in mind that this question in its last analysis becomes a question of what is the extent of the indemnity furnished appellant by the policies. When that question is determined, it of course follows that the compensation of all employees whose injuries or death appellant is indemnified against furnishes the measure for determining the amount of premiums earned during the life of the policies. 1 May, Insurance (4th ed.), §§ 174, 175. We conclude that all employees in and about the several shops and places designated are within the terms of the policies, and that their entire compensation forms the proper basis for computation

of premiums earned. This being true, the learned trial court did not err in the view adopted by it, unless it erred in including the compensation of certain employees which, even under such construction, should not be included.

It is contended by counsel for appellant that the trial court erred in including in its computation employees of the power, heat and light department, such as engineers, firemen and electricians employed therein. While this work was carried on in what might be termed in a sense a separate plant —that is, it was physically separate, so far as its housing was concerned, from the other shops and places—yet it furnished power and light for the entire plant, and in that sense was a part of each particular department for all practical purposes, as much so as if it had been under the same roof with such department. Viewed in this light, these employees were in a sense employed in every department of the whole plant where light and power were used. These employees were classed by the court as belonging to "machine shop, pattern shop and foundry." This resulted in their being classed at the rate of 44c, as will be noticed by reference to the schedule in policy No. 3166. This rate is next to the lowest, and is considerably below the average of all the rates specified. Since we conclude that respondent was entitled to premium based upon the compensation of these employees, at least at some rate, it clearly was not prejudicial to appellant's rights that the rate was fixed at less than the average named in the policies.

It is contended that the court erred in taking into consideration, as a basis for its computation of premiums earned, the compensation of timekeepers; the argument being that these were necessarily included in the clerical force which we have noticed was excepted by the terms of the policies. It appears that at least some of these timekeepers were also workmen, and apparently all of them had to go among the workmen to some extent in the several shops and places in performing their duties. We think there was no error in the

court using the compensation of these employees as a part of the basis for computing the premiums earned.

It is contended that the court erroneously included the compensation of all the drivers, without making any attempt to segregate those drivers working upon the premises and those working away from the premises. It does not appear that there were any drivers who worked all the time away from the premises. We think the language of the policies above quoted readily shows that drivers were to be included, even though they did not actually work upon the premises all of the time.

What we have said relative to power plant employees and timekeepers disposes of other contentions as to particular employees. The case of *New Amsterdam Casualty Co. v. Mesker*, 128 Mo. App. 183, 106 S. W. 561, involved facts similar to those here involved. That case is in harmony with the views we have here adopted. Our views also find support in *Fidelity & Casualty Co. v. Lone Oak Cotton Oil & Gin Co.*, 35 Tex. Civ. App. 260, 80 S. W. 541, and *Hoven v. Employers' Liability Assur. Corp.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388. We are of the opinion that the judgment was correctly rendered against appellant upon the merits.

In rendering judgment the trial court allowed interest at the legal rate from the 4th day of May, 1906, that being the date of the expiration of the policies and therefore the date upon which the balance of the premium became due. It is contended that this was erroneous because respondent was suing upon an unliquidated demand, and that therefore interest was not allowable prior to the actual entry of the judgment. This is not a suit for damages based upon tort, nor do we think it is an accounting; but it is a suit to recover an amount due upon a specific contract for the payment of money and the amount due was determinable by computation. It is true that the legal basis of the computation was a subject of controversy between the parties, but we think

that is immaterial. *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143, 39 Pac. 380; *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381; *Dickinson Fire & Pressed Brick Co. v. Crowe & Co.*, 63 Wash. 550, 115 Pac. 1087; *Fell v. Union Pac. R. Co.*, 32 Utah 101, 88 Pac. 1003, 28 L. R. A. (N. S.) 1, and note; 22 Cyc. 1513. That a suit to recover a claim of this nature is a suit to recover a specific sum due upon contract, and hence not an accounting, is held in *Pacific Coast Casualty Co. v. Home Tel. & Tel. Co.*, 11 Cal. App. 712, 106 Pac. 262. We are of the opinion that the trial court was not in error in allowing interest.

Counsel for appellant contends that the trial court should have apportioned the costs in that court between it and respondent, since the cause was originally prosecuted upon three separate causes of action, each policy forming the basis of a cause of action; and that upon the computation of premium earned there was found to be a balance due to respondent upon only two of the policies, while there was found to be a refund due appellant upon another. This refund, being offset against the amount found due upon the other two, left a balance for which the judgment was finally rendered. It is clear, under Rem. & Bal. Code, § 476, that the prevailing party is entitled to costs. This rule seems to be without any exception growing out of there being several causes of action involved when recovery is had upon only some of them. Some states have statutes which make exceptions in such cases and provide for the apportioning of costs under such circumstances, but the rule seems to be, in the absence of such statute, that the prevailing party is regarded as that party only who has an affirmative judgment rendered in his favor at the conclusion of the entire case. 11 Cyc. 28. It follows that the taxation of costs in respondent's favor in the trial court was not erroneous.

We conclude that the judgment must be affirmed. It is so ordered.

MOUNT, C. J., GOSE, CROW, and CHADWICK, JJ., concur.

[No. 10659. Department One. November 25, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. E. E. ANDREWS, *Appellant*.[1]

FORGERY — JOINT PROSECUTION — ACTS AND "POSSESSION" OF CONSPIRATORS—COMMON DESIGN. It is no defense to a joint prosecution for knowingly having in possession a forged instrument with intent to utter it, that the instrument was taken from the actual possession of only one of the conspirators, where there was abundant evidence that they were acting in concert with a common criminal design.

CRIMINAL LAW—APPEAL—EXCEPTIONS — NECESSITY. Instructions cannot be reviewed on appeal where no exceptions were taken, even where accused is defended by counsel appointed by the court.

SAME—TRIAL—WRITTEN INSTRUCTIONS—WAIVER. A defendant in a felony case may waive the statutory requirement that the instructions to the jury be given in writing.

SAME—SENTENCE—MINIMUM FIXED BY STATUTES. An indeterminate sentence for a term of not less than ten years and not more than twenty years is beyond the power of the court where the maximum allowed was twenty years and the statute expressly limits the minimum term to "not less than six months nor more than five years."

SAME—APPEAL—DECISION—REDUCTION OF SENTENCE. Where the trial court exceeds its power in imposing a sentence, the supreme court will not order a new trial, but will remand the case for the proper sentence.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 16, 1912, upon a trial and conviction of forgery. Modified.

Sidney J. Williams and *Alfred H. Lundin*, for appellant.

John F. Murphy, *Crawford E. White*, and *Reah M. Whitehead*, for respondent.

GOSE, J.—The defendant and one Kastriner were jointly tried and convicted on a charge of knowingly having in their possession a forged instrument with an intent to utter it. The defendant has appealed from the judgment entered

[1]Reported in 127 Pac. 1102.

upon the verdict. Three errors are assigned: (1) Insufficiency of the evidence to support the verdict; (2) error in the instructions, and (3) error in the sentence. The instrument which forms the basis of the charge is as follows:

Seattle, Wash., 2-4-12, 190 No. 18.

THE STATE BANK OF SEATTLE

Pay to the order of Henry B. Shaw, $24.80
Twenty four and 80-100 Dollars.
Not over Twenty Five Dollars 25
Seattle Cornice Works
W. M. Bryant.

Two witnesses, Speight and Yank, jailors at the King county jail, testified in substance that Kastriner called at the jail on the date charged in the information at about the hour of four o'clock in the afternoon, and left a library book inclosed in a paper, with directions to hand it to appellant; that the book was opened and found to contain six blank checks on the State Bank of Seattle; that the book with the checks was rewrapped and handed to the appellant in his cell; that Kastriner returned about an hour later and requested permission to see the appellant; that he and the appellant were permitted to talk privately in the jail for about fifteen minutes, when the witness Beebe, a deputy sheriff, searched Kastriner and found in his inside coat pocket the check in question, and four other checks drawn on the State Bank of Seattle and stamped and signed in the same manner; that a sixth check partially filled out was found on appellant's person, and that a stamp pad was found in his cell. The witness Beebe testified, that he took a position without the jail where he could observe the appellant and Kastriner; that he saw the former take some papers from his pocket that looked like checks and hand them to the latter, who placed them in his inside coat pocket and took a check book out of his pocket, and handed it to the appellant who put it in his pocket; that when Kastriner was searched the five drawn checks were the only papers found

on his person. These witnesses further testified that, after making some denials, both the appellant and Kastriner admitted that the former had given the five drawn checks to the latter, and that the appellant said he had destroyed the stamp or stencil which he had used in signing the checks. The argument is that the check was taken from Kastriner, and that there is no evidence that it was in "their possession;" that is, the possession of both defendants as charged in the information.

It is true that the appellant and Kastriner did not both have the actual physical possession of the check at the same time. There is, however, abundant evidence that the two were acting in concert, with a common criminal design. The declarations, therefore, of one are admissible against the other, and the possession of the one was the possession of both. Where two or more persons conspire to commit a criminal act, the acts and declarations of each in furtherance of the common design are the acts and declarations of all. *State v. Baker*, 69 Wash. 589, 125 Pac. 1016; *State v. Williams*, 62 Wash. 286, 113 Pac. 780; *State v. Dilley*, 4 Wash. 207, 87 Pac. 133; *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

There were no exceptions to the instructions. In the absence of exceptions, we have uniformly held that the instructions will not be reviewed. *State v. Hatch*, 63 Wash. 617, 116 Pac. 286. Counsel argue that the rule should be relaxed because the appellant was defended by counsel appointed by the court. This cannot change the rule. The counsel may have been influenced by the fact that the evidence of the appellant's guilt was so conclusive that a new trial would have been barren of benefit to him.

It is further complained that the instructions were oral. Counsel stipulated that the court might instruct orally. It is argued that the statute requiring instructions to be in writing is mandatory, and that its provisions cannot be waived in felony cases. The rule is that such requirements

may be waived in such cases. *Bruen v. People*, 206 Ill. 417, 69 N. E. 24; *State v. Bungardner*, 66 Tenn. 163; *Voght v. State*, 145 Ind. 12, 43 N. E. 1049. In *State v. Dilley*, *supra*, a felony case, it was held that the defendants impliedly waived the right to be furnished with a copy of the information. In *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, and *McIntosh v. Saw Mill Phoenix*, 49 Wash. 152, 94 Pac. 930, cited by the appellant, the defendant requested the court to charge the jury in writing, and a noncompliance with the request was held to be error.

The appellant was sentenced for a term of not less than ten years nor more than twenty years. The court had the power to fix the maximum term at twenty years, but the statute expressly limits the minimum term to "not less than six months nor more than five years." Rem. & Bal. Code, § 2281. Where a court has exceeded its power in imposing a sentence, a new trial will not be ordered, but the case will be remanded to the trial court for the imposition of the proper sentence and judgment. *State v. Gilluly*, 50 Wash. 1, 96 Pac. 512.

Remanded, with directions to enter a judgment in harmony with this opinion.

Mount, C. J., Parker, Crow, and Chadwick, JJ., concur.

[No. 10451. Department Two. November 29, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. JAY FOX, *Appellant*.[1]

CONSTITUTIONAL LAW—CIVIL RIGHTS—FREEDOM OF SPEECH AND OF THE PRESS. Rem. & Bal. Code, § 2564, prohibiting the editing of any printed matter tending to encourage disrespect for law, is not unconstitutional as abridging the right of free speech and of the press; since the legislature has power to punish abuse of the right.

CRIMINAL LAW—OFFENSES—CERTAINTY—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 2564, providing punishment for any person who edits printed matter which shall "tend to encourage disrespect for law" is not objectionable as uncertain in defining the nature of the crime.

CRIMINAL LAW—TRIAL—RIGHT TO SPEEDY TRIAL—DISMISSAL—GOOD CAUSE FOR DELAY. Under Rem. & Bal. Code, § 2312, providing for the dismissal of a cause if not tried within sixty days after information filed, unless good cause to the contrary be shown, a dismissal is properly denied where the defendant filed a demurrer, and on the hearing thereof his counsel required more time than the court had at its disposal, and the arguments and trial were for that reason delayed for the accommodation of the defendant.

CRIMINAL LAW—APPEAL—HARMLESS ERROR—EVIDENCE—QUESTION FOR COURT. In a prosecution for editing printed matter tending to encourage disrespect for the law, it is not prejudicial error that certain improper evidence was received to prove that the article tended to have that effect, where the printing was admitted and clearly on its face had that effect and incited the commission of crime; since it became the duty of the court to instruct the jury what the effect of the article was as a matter of law.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 6, 1912, upon a trial and conviction of editing printed matter tending to encourage disrespect for law. Affirmed.

Jas. J. Anderson, for appellant.

J. L. McMurray, A. O. Burmeister, and *G. C. Nolte*, for respondent.

[1]Reported in 127 Pac. 1111.

MOUNT, C. J.—The appellant was convicted upon a charge of editing printed matter tending to encourage disrespect for law. He was sentenced to a term of two months in the county jail of Pierce county. He appeals from that judgment, and assigns several errors, which we shall briefly notice.

This prosecution is based upon Rem. & Bal. Code, § 2564, which provides as follows:

"Every person who shall willfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or of any court or courts of justice, shall be guilty of a gross misdemeanor."

The defendant was accused of editing an article entitled "The Nude and the Prudes," which was published in "The Agitator," a small paper issued and circulated in Pierce county. Its publication appeared on July 1, 1911. The appellant apparently concedes that the article does tend to encourage disobedience and disrespect for law, for it clearly does so. But he argues that the statute is unconstitutional because it abridges the right of free speech and of the press, and also because the statute is uncertain. While the constitutions of the United States and of this state guarantee the right to freely speak, write and publish upon all subjects, it is not meant thereby that persons may with impunity advocate disregard of law; or, as said in *People v. Most*, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509:

"While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the constitution, and authority to provide for and punish such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability of the state."

This is the rule, and the statute under consideration is not repugnant to the constitutional provisions relating to freedom of speech and of the press.

The appellant also argues, and cites numerous cases to the effect, that a statute creating an offense must be certain, and that, where the law is uncertain, there is no law. This is no doubt the rule. We are satisfied it has no application to the statute under consideration. The statute provides: "Every person who shall willfully . . . edit . . . any . . . paper . . . or printed matter . . . advocating . . . the commission of any crime . . . or which shall tend to encourage disrespect for law . . . shall be guilty of a gross misdemeanor." It is argued that the phrase "or which shall tend to encourage disrespect for law" is entirely uncertain. But it has been held that a criminal statute is not void for uncertainty because it denounces acts which "tend," or are "reasonably calculated," to bring about prohibited results. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86.

The act here charged is the editing of an article or printed matter tending to encourage disrespect of law or incite the commission of crime. There can be no doubt about the meaning of the article which defendant edited, or that it tended to incite the commission of crime. The article is not a criticism of the law, but was calculated to, and did, incite the violation of law; and there can be no doubt that any reasonable person informed against under the law, as defendant was, would immediately know the exact character of the offense with which he was charged. We think the information and the statute are definite and certain as to the elements of the crime charged. The demurrer was therefore properly overruled.

It is also argued that the court erred in refusing to dismiss the action because it was not brought on for trial within sixty days after the information was filed. The information was filed on August 23, 1911. On September 13, the defend-

ant filed a general demurrer to the information. This demurrer was noticed for hearing on the 16th day of September. The trial court apparently did not hear the argument upon the demurrer at that time. On October 25, 1911, the defendant filed a motion to dismiss, upon the ground that the action had not been brought to trial within sixty days after the information was filed. At the same time, defendant filed an affidavit stating the time when the information was filed, and that a demurrer had been filed thereto and noticed for hearing upon a day fixed by the rules for such hearing; that it had been carried upon the motion calendar and had not been heard, and that the defendant had at all times been ready to argue the demurrer. The affidavit further stated that other parties charged with crime, upon informations which were filed subsequent to the date of the information against the defendant, had been brought to trial. The trial court denied this motion, and recited in the order denying the same that "good cause existed for not bringing said cause on for trial within sixty days after the filing of the information, inasmuch as defendant requested more time to present arguments on the demurrer interposed by defendant to the information herein than the court had at its disposal." Thereafter on November 6, 1911, the demurrer was heard and overruled. The statute provides that, if a defendant whose trial has not been postponed upon his own application be not brought to trial within sixty days after information filed, the court shall order it to be dismissed unless good cause to the contrary be shown. Rem. & Bal. Code, § 2312. It is apparent from the record that the delay was caused by the defendant. He had filed a demurrer to the information, and when the demurrer came on for hearing, his counsel required more time to present his argument upon the demurrer than the court had at its disposal. The arguments and the trial were for that reason delayed, for the accommodation of the defendant if not upon his own application. This was a sufficient reason for denying the motion.

Complaint is also made that the court erred in receiving certain evidence to the effect that there were more prosecutions for indecent exposure after the publication of the article than there were before that time. It is claimed that the records of the justice of the peace were the best evidence of that fact, and that such evidence was improper and prejudicial. This evidence was not prejudicial because, when the editing and publication of the article were proved or admitted, it was the duty of the court to instruct the jury, as a matter of law, what the effect of the article was. That was a question of law and not of fact. It clearly upon its face incited the commission of crime and disrespect of law relating to indecent exposure of the person, and whether it did so as a matter of fact was therefore not prejudicial. Any other rule would require proof that an article advocating the commission of crime had actually incited persons to commit a crime, before a conviction could be had for the publication of such articles.

There is no error in the record, and the judgment is therefore affirmed.

MORRIS, MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 10575. Department One. December 5, 1912.]

SARAH A. GUST, *Respondent*, v. ADOLPH A. GUST, *Appellant*.[1]

APPEAL—RECORD—STATEMENT OF FACTS. In the absence of a statement of facts to bring up the evidence on which a party was adjudged in contempt of court, it will be presumed that the evidence sustained the judgment and the order must be affirmed.

APPEAL—ORDERS REVIEWABLE—CESSATION OF CONTROVERSY. An appeal from an order imprisoning a party for contempt of court will be dismissed, where it appears on the hearing that he has been discharged and has complied with the order adjudging the contempt.

[1]Reported in 128 Pac. 1.

Appeal by defendant from an order of the superior court for King county, Myers, J., entered May 21, 1912, adjudging defendant to be in contempt of court for failure to comply with an order for temporary alimony and suit money. Affirmed.

George W. Saulsberry (*H. E. Foster* and *L. Y. Devries*, of counsel), for appellant.

Edward Judd, for respondent.

Crow, J.—Sarah A. Gust commenced this action against Adolph A. Gust, her husband, to obtain a decree of divorce, and on May 6, 1912, the trial judge entered a final decree in which certain amendments to her complaint were permitted, a divorce was denied, and she was awarded $400 costs and $600 attorney's fees. By the decree it was:

"Further ordered, adjudged and decreed, that the temporary alimony heretofore ordered by this court, amounting to the sum of seventy-five dollars, and which was due April 1, 1912, and which is unpaid, be paid by the defendant to the plaintiff or her attorneys, on or before the 11th day of May, 1912."

In *Gust v. Gust*, 70 Wash 695, 127 Pac. 292, this court, on the plaintiff's appeal, reversed the order of dismissal and remanded the cause for further proceedings. From the portion of the decree above quoted, it appears that the defendant had been in default from and after April 1, 1912, for the payment of $75 temporary alimony, and that he was directed to pay the same on or before May 1, 1912. On May 13, 1912, on the plaintiff's application, a show-cause order was issued and served upon the defendant, commanding him to appear on May 17, 1912, and show cause, if any he had, why he should not be punished for contempt of court for his failure to pay the sum of $75 temporary alimony. To this show-cause order, he filed an answer, and on May 21, 1912, an order was entered adjudging him to be in contempt, and further ordering "that he be forthwith committed to the jail

of the county of King in the state of Washington, as a punishment for such contempt, and that he be there imprisoned until the further order of this court." From the order adjudging him guilty of contempt and the order of imprisonment, the defendant has appealed.

No statement of facts has been filed or certified showing the evidence introduced at the hearing on the show-cause order. It appears from the record, that appellant had been directed to pay $75 temporary alimony; that he failed to do so; that on the date of the final decree he was in default; that he was then directed to pay the same on or before May 12, 1912; that contempt proceedings were instituted; that he appeared and answered, and that he was adjudged to have been in contempt. It is to be presumed that the evidence introduced was sufficient to sustain the final order of the trial judge, and in the absence of any statement of facts or bill of exceptions, we cannot review, but must affirm, that order.

Appellant further complains that the trial judge erred in the penalty imposed, in that he did not fix any definite term of imprisonment, or direct that appellant should be imprisoned until he had complied with the order of the trial court. Rem. & Bal. Code, § 1059, provides that:

"When the contempt consists in the omission or refusal to perform an act which is yet in the power of the defendant to perform, he may be imprisoned until he shall have performed it, and in such case the act must be specified in the warrant of commitment."

The order of commitment, which in all probability was prepared by some one of the counsel who appeared in the cause, and was thereafter signed by the trial judge, is not drawn in the language of the statute and may not be in accordance therewith. Be that as it may, the controversy has ceased, as the record further shows that appellant was released on May 22, 1912, when he perfected this appeal and filed a supersedeas bond. It further shows that afterwards, to wit,

on May 25, 1912, the $75 temporary alimony was paid to respondent's counsel.

With the record in this condition, the judgment must be affirmed. It is so ordered.

MOUNT, C. J., PARKER, GOSE, and CHADWICK, JJ., concur.

[No. 10422. Department One. December 5, 1912.]

CHARLES RICHARDSON *et al.*, *Appellants*, v. CHARLES A. BROWER *et al.*, *Respondents*.[1]

COVENANTS—QUIET ENJOYMENT—CONSTRUCTION—OUTSTANDING LEASE—RELATION—ESCROWS. Upon a sale of property under a written agreement to accept the premises subject to the "present tenancy," rents to be adjusted as of the date of delivery of the deed, which was done, the grantee thereafter collecting the rents, an action for breach of covenant for peaceable possession and quiet enjoyment by reason of an outstanding lease cannot be maintained, it appearing that the parties considered the tenancy and contracted with reference thereto.

SAME—LEASE AS INCUMBRANCES—"EXISTING TENANCIES"—CONSTRUCTION—KNOWLEDGE—ATTORNMENT. An action for breach of covenant of warranty against incumbrances by reason of an outstanding lease cannot be maintained where the grantee had knowledge of the lease, and there was an attornment and apportionment of the rent at the time of the transfer.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered September 28, 1911, dismissing an action on covenants, after a trial on the merits. Affirmed.

Walter M. Harvey (*John A. Shackleford*, of counsel), for appellants.

Hudson, Holt & Harmon and *Fletcher & Evans*, for respondents.

CHADWICK, J.—On December 15, 1908, Charles M. Gardner, now deceased, sold to Guy L. Morris and Charles

[1]Reported in 127 Pac. 1098.

Richardson certain real property, occupied by a three-story brick building in Tacoma, Washington, for the sum of $95,000, upon the following terms.

"Balance of purchase price to be paid as follows: Forty-five thousand ($45,000) upon delivery of clear title excepting mortgage for thirty thousand dollars ($30,000) hereinafter referred to and deed of conveyance and fifteen thousand dollars ($15,000) in annual payments of five thousand dollars ($5,000) each at 5% interest and assume present mortgage of thirty thousand ($30,000). Upon delivery of a good and sufficient warranty deed excepting said mortgage or contract of sale agreeing to convey said property free and clear of all incumbrances."

It was further provided that:

"Purchaser agrees to accept the premises subject to the present tenancy; the rents, insurance and interest, on the incumbrance, if any, to be adjusted as of the date of delivery of deed or contract as herein provided."

Thereafter the deal was consummated, the rents, insurance, interest, taxes, etc., were adjusted as of January 13, 1909, and the purchasers, the plaintiffs here, thereafter collected all the rents from the building. At the time of the delivery of the deed and for a long time prior thereto, the ground floor with part of the second floor of the building was in the possession of the Tayler-Gardner Company and its receiver, it being then in process of liquidation by the courts. The Fidelity Trust Company of Tacoma had received the money and notes from the purchasers, and by direction of the owners had kept possession of them until the last note was paid. Although disputed by plaintiffs, we are convinced that it was the understanding of the bank that it held the papers as an escrow pending complete performance of the contract. The testimony of the officer having the matter in charge is supported by the fact that the deed remained in the possession of the bank until the last note was paid, no demand being made therefor. The deed was in common-law form,

and contained the usual covenants. Alleging a breach of the covenant for peaceable possession and quiet enjoyment, plaintiffs brought this action. The material parts of their complaint follow:

"That on the said 18th day of January, 1909, there were (unknown to the plaintiffs) certain secret and unrecorded leases of portions of said premises which had been made, executed and delivered by the said Charles N. Gardner, in his lifetime, together with the said Mary A. Gardner, his wife, and particularly there had been made, executed and delivered by the said Charles N. Gardner, in his lifetime, together with his wife, a lease of the C. Street front of said premises to Tayler-Gardner & Company, a corporation, which was at said date in the hands of its receiver, one John B. Reed, which facts were unknown to the plaintiffs.

"That the said Charles N. Gardner in his lifetime, together with his wife, failed, neglected and refused to put the plaintiffs herein, in possession of said premises, the same being then occupied by the said John B. Reed, as receiver of the said Tayler-Gardner & Company, and other tenants of said Charles N. Gardner, now deceased, and his said wife who refused to vacate said premises upon the demand of the plaintiffs; that the said plaintiffs were kept out of possession of said premises by tenants of said deceased, Charles N. Gardner, and his wife, from the first day of February, 1909, to the first day of February, 1910; that the fair and reasonable rental value of said premises during said time was the sum of eight hundred dollars ($800) per month, net, that is over and above the light and water rent, and other expenses of maintenance, but on account of the occupation of said premises by tenants of said Charles N. Gardner, deceased, and his wife as aforesaid, the said plaintiffs from the first day of February, 1909, to the 31st day of December, 1910, received from said tenants of the said deceased and his wife, the sum of four hundred dollars ($400) per month, and only said sum, and during said eleven months, plaintiffs aforesaid lost in rentals the difference between the amount received by them from the tenants of said deceased and his wife the sum of four hundred dollars ($400) per month, and the fair and reasonable rental value of said premises, to wit: the sum of eight hundred dollars ($800) per month, making in all the sum of forty-four

hundred dollars ($4,400), and said plaintiffs by reason of the facts aforesaid received no rent, whatever, for the month of January, 1910, and the said plaintiffs by reason of the breach of said agreement and covenants of warranty on the part of said deceased and his wife, have been damaged in the full sum of fifty-two hundred dollars ($5,200), no part of which has ever been paid by the said deceased and his wife or the defendant to the plaintiffs."

Damages are prayed for in the difference of the rental value of the premises. After a trial the court below found for the defendants, and dismissed plaintiffs' suit.

Upon this appeal, many questions of law have been proposed and discussed. A careful review of the evidence has convinced us that the trial judge was correct in his judgment. There are two controlling questions of fact, the first being whether the deed was left in escrow pending payment of the notes; and the second, whether appellants had such notice of the existing tenancy at and before the time the deed was executed and delivered (in escrow) as to bind them to the contract as it has been acted by the parties, and to a literal meaning of the words of the preliminary contract: "subject to existing tenancies." As suggested, the affirmative of these propositions is sustained by a preponderance of the evidence, and being thus established, but one legal conclusion can follow; that is, that there can be no recovery.

But appellants most seriously contend that, although the deed was left at the bank in escrow, it is subject to the equitable doctrine of relation; and the lease to Tayler-Gardner Company not being excepted *eo nomine*, appellants are entitled to recover. If we were in doubt as to the original contract and intent of the parties, some ground for this contention could be found. But there is ample testimony to show that the question of tenancies was considered by the parties, and the contract was drawn with reference thereto. It may be true that appellants would not have purchased the property if they had reason to believe that the tenancy would have continued beyond the time, or a reasonable time, after they

took possession. But there is evidence showing that, if they relied upon an immediate vacation, it was in consequence of their own negotiations with the tenant, and not because of the form of the contract, which was not misleading, or of the deed which was drawn thereunder. It might be argued with equal force under the testimony that Gardner would not have sold the property if the appellants had not contracted to take it subject to his contracts. The doctrine of relation is invoked and applied to protect a right or equity; never to defeat or destroy them. Considering the relations of the parties from the time of their first negotiations and their subsequent conduct, even up to the time this suit was brought, we find no place for its application.

Finally, appellants contend that, if the court is to construe the contract and deed together, it can be done only by saying that the phrase "existing tenancies" means only such tenancies as are not incumbrances within the meaning of that term. There are cases holding that any lease or tenancy is an incumbrance, whether within the knowledge of the grantee or not. But there are many well-considered cases—and we are inclined to believe that they state the rule as it should be—holding that, where certain leases were within the knowledge of the parties, and from an inspection of the whole record it seems most likely that the deed was accepted subject thereto, an action cannot be maintained upon a covenant against incumbrances. This rule is declared generally by some courts; by others reference is made to some statute. But, wherever made to rest, the rule is the same; it comes of sound reason, for a lease is not always an incumbrance. Mr. Devlin, in his work on Deeds (3d ed.), § 906, after saying that the word "incumbrance" does not admit of a general, and at the same time accurate, definition, says:

"Take, for instance, the case of an outsanding lease. It can easily be imagined that, in many cases, the fact that a piece of property was leased for a number of years would, were the property sought for an investment, add to its value:

while, if the purchaser desired the present possession of the property, the existence of a lease might detract from its market value."

In *Allen v. Lee*, 1 Ind. 58, 48 Am. Dec. 352, it is said:

"A general covenant of warranty does not, at least conclusively, extend to such incumbrances as were known to the purchaser at the time of the contract and which he agreed to pay or discharge himself in addition to or as part of the consideration moving from him to the vendor, and when the question is, as in this case, what was the true consideration paid for the land? we think such facts may be given in evidence without in any manner contradicting the terms of the written warrants."

The case of *Williams v. Frybarger*, 9 Ind. App. 558, 37 N. E. 302, was in many respects similar to the case at bar. The court held "that the mere occupancy of the vendor's tenants cannot operate as a breach of the covenants of the deed." It will be remembered that the rents were adjusted between the parties, and after January 13, 1909, the tenant attorned to appellants.

"As a general rule, however, no one selling real estate in a city would dream that his covenant was broken by there being a tenant from year to year in possession. Usually the rent is apportioned, as are the taxes, interest on incumbrances, etc., up to the date of the conveyance, and the tenant attorns to the purchaser. Such a tenancy for years is obviously no breach of the covenant for seisin." Rawle, Covenants for Title (5th ed.), § 58, footnote.

"And it is conceived that in practice, in the ordinary case of the sale of improved property which is tenanted, and of which by the terms of the contract the rent passes with the reversion, few vendors ever dream of specially excepting the lease from the operation of a covenant against incumbrances. An apportionment is usually made, up to the date of the deed or of the delivery of possession, of the taxes, interest on incumbrances, water-rent, and the like, on the one hand, and of the rent, on the other; the former being paid by the vendor and the latter by the purchaser, to whom the tenant then at-

torns and pays the rent when due. Here it would seem impossible to call such a lease an incumbrance." Id., § 78.

"At the common law, after attornment, the occupancy of the tenant could not be deemed a breach of any covenant in the deed. The reason is obvious. The tenant was thereafter the tenant of the purchaser. In contemplation of law the tenant received his possession from such purchaser, and at the expiration of his term was bound to surrender it to him. The statute now accomplishes the same purpose; it transfers the possession. It enables the purchaser to collect the rent, to enforce all other obligations of the tenant, and compels him, at the expiration of his term, to yield the possession to the purchaser. It establishes the relation of landlord and tenant between the parties, and entitles the purchaser to all the remedies applicable to such relation. This being true, it must follow that the mere occupancy of the vendor's tenants cannot operate as a breach of the covenants of the deed." *Kellum v. Berkshire Life Ins. Co.*, 101 Ind. 455.

See, also, 11 Cyc. 1109; 8 Am. & Eng. Ency. Law (2d ed), 129; *Sidders v. Riley*, 22 Ill. 109; *Haldane v. Sweet*, 55 Mich. 196, 20 N. W. 902; Maupin, Marketable Title to Real Estate, § 125.

We go no further than to hold that, where a lease is outstanding, of which the grantee had knowledge, followed by an attornment and an apportionment of the rent at the time of transfer, an action for breach of the covenant of warranty cannot be maintained.

Finding no error, the judgment of the lower court is affirmed.

MOUNT, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 10396. Department One. December 6, 1912.]

The State of Washington, *Respondent*, v. J. C. Burnam, *Appellant*.[1]

Food—Adulteration—Criminal Prosecution—Liability of Agent or Manager—Intent—Knowledge. Under Rem. & Bal. Code, § 2513, providing a penalty for selling, or having in possession with intent to sell, milk below the standard fixed by law, regardless of guilty knowledge or criminal intent, the manager of a dairy corporation having general supervision of the mixing of the milk may be guilty of violation of the statute although he was not present when the milk left the dairy and had given instructions to keep it up to standard.

Same—Criminal Prosecution—Conditions Precedent—Samples—Analysis—Statutes—Construction. A compliance with Rem. & Bal. Code, § 5478, which makes it the duty of the person collecting samples of milk for analysis to send the result of the analysis within ten days to the person from whom the sample was taken or to the person responsible for the condition of the milk, is not a condition precedent to the prosecution of a person for violating the pure milk law, in view of other provisions of the law, Id., § 5468, providing for the delivery of samples of the milk taken and that no evidence of the analysis shall be given if such samples are not delivered on request, and § 5477, providing that a producer of milk is not liable unless the milk is taken upon his premises or while in his possession and a sealed sample thereof given to him.

Trial—Instructions—Oral Instructions. Under Rem. & Bal. Code, § 339, requiring that instructions to the jury be given in writing, it is reversible error to give oral instructions over the objection of the appellant.

Appeal from a judgment of the superior court for King county, Gay, J., entered September 16, 1911, upon a trial and conviction of a violation of the pure milk law. Reversed.

Walter S. Fulton and *Brightman & Tennant*, for appellant.

John F. Murphy, *Crawford E. White*, and *Reah M. Whitehead*, for respondent.

Gose, J.—The defendant was convicted of the offense of having in his possession, with intent to sell and deliver, milk

[1]Reported in 128 Pac. 218.

of a grade below the standard fixed by law (Rem. & Bal. Code, § 2513), and has appealed.

The facts are that the appellant, at the time of the commission of the offense, was the secretary-treasurer and manager of Northwestern Dairy Company, a corporation, organized under the laws of the state of Oregon, and doing business in this state; that he was the manager of the active business of the corporation, employed and discharged the men, and bought and had general supervision of the mixing of the milk; that two bottles of milk were taken from a wagon belonging to the corporation, and sealed, and one bottle was given to the driver of the wagon, and the other was retained by the officer, and that a chemical analysis showed that the milk had been watered and was below standard. The appellant testified that he was not present when the wagon left the dairy, and that his instructions were to keep the milk up to the standard fixed by law.

The appellant first contends that the offense was that of the corporation and that, under the facts, he is immune from punishment. We cannot assent to this view of the law. The statute provides that every person who shall sell or deliver, or offer for sale, or have in his possession with intent to sell or deliver, milk below the standard fixed by law, shall be guilty of a misdemeanor. This is a police regulation enacted for the protection of the public health, and the penalty is imposed without regard to any wrongful intention, in order to insure such diligence as will render a violation of the law practically impossible. *State v. Constatine*, 43 Wash. 102, 86 Pac. 384, 117 Am. St. 1043; *Spokane v. Patterson*, 46 Wash. 93, 89 Pac. 402, 123 Am. St. 921, 8 L. R. A. (N. S.) 1104; *State v. Nicolls*, 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912 B. 1088; *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 75 Pac. 924, 105 Am. St. 74; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; *Rex v. Medley*, 6 Car. & P. 292, 403; 1 McClain, Criminal Law, § 190.

In *State v. Constatine*, the owner of a saloon was convicted of the crime of knowingly selling intoxicating liquors to a minor, where the sale was made by his bartender when the owner was absent and had no notice or knowledge thereof. Upon appeal, the judgment was affirmed. In *Spokane v. Patterson*, a conviction was sustained where a blast, not covered as required by ordinance, was discharged by an employee. It was held that, although the defendant had given proper instructions to his servants and had no knowledge of the violation of the ordinance, he was responsible for their act. In *State v. Nicolls*, it was held that the lack of intent does not excuse an infraction of a police regulation. In *Overland Cotton Mill Co. v. People*, a conviction was sustained against an officer of the corporation for violating a statute making it a misdemeanor for any person to employ a child under fourteen years of age in any mill or factory. There, as here, it was contended that the evidence was not sufficient to justify the conviction. In meeting this contention, the court said:

"An agent of a corporation is presumed to have that knowledge of its affairs particularly under his control and management which, by the exercise of due diligence, he would have ascertained."

In *People v. Detroit White Lead Works*, *supra*, in affirming a conviction against the officers of the defendant corporation for maintaining a nuisance, the court said:

"All the defendants were properly convicted. The officers of the company are jointly responsible for the business. It is not necessary to conviction that they should have been actually engaged in work upon the premises. The work is carried on by employees. The directors and officers are the persons primarily responsible, and therefore the proper ones to be prosecuted. A fine can be collected against the defendant company, and therefore it is subject to prosecution."

The same principle was announced in *Rex v. Medley*, *supra*. McClain makes the following succinct statement of the law:

"Where the manner of conducting a business is the offense, and the agent or servant controls or aids and assists in the regulation of the business, he may be liable as well as the principal." 1 McClain, Criminal Law, § 190.

We think the rule applied to the principal in the cases cited from this court should be extended to a managing agent when the offense consists in the violation of a police regulation where neither a guilty knowledge nor a criminal intent is made an element of the offense. *State v. Botchford, ante* p. 114, 127 Pac. 837. The appellant relies upon the following cases: *People v. Clark*, 14 N. Y. Supp. 642; *State v. Parsons*, 12 Mo. App. 205; *Rex v. Hays*, 14 Ontario Law Rep. 201.

In the *Clark* case, the court said:

"It having been established that a corporation may be indicted for a misdemeanor, the next question presented is, can any person or persons be guilty of a criminal violation of a statute directed against such corporation? I think that any person or persons participating in the violation of the statute by the corporation may, under our statutes, be indicted as principals, either because they have directly committed the act, or have aided and abetted in such commission."

In the *Parsons* case, a guilty knowledge was made an element of the offense, and it was held that the president of a corporation could not be convicted in the absence of evidence that he had knowledge of the commission of the unlawful act. *Rex v. Hays*, seemingly supports the appellant's view. In the case at bar, the business was a lawful one, but the offense consists in the manner of conducting it. The appellant had the practical control of the business, and it was his duty to see that the requirements of the law were observed.

The code, Rem. & Bal., § 5478, makes it the duty of the person who collects samples of milk for analysis to send the result of the analysis to the person from whom the sample was taken, or to the person responsible for the condition of the milk, within ten days after obtaining the result of the analysis. The record does not show that this was done; and

it is argued that a compliance with the statute is a prerequisite to the right of the state to prosecute. The statute does not so provide. It does provide, however (Rem. & Bal. Code, § 5468), that the party collecting the samples shall, upon request made at the time the sample is taken, seal and deliver to the owner or person from whose possession the milk is taken a portion of each sample; that the inspector shall cause the sample to be analyzed as to its quality or purity; and that "no evidence of the result of such analysis or test shall be received, if the inspector or collector upon request refuses or neglects to seal and deliver a portion of the sample taken, as aforesaid, to the owner or person from whose possession it is taken." Section 5477 provides that a producer of milk shall not be liable to prosecution for the reason that the milk produced by him is nonstandard, unless the milk was taken upon his premises or while in his possession or under his control, by an inspector or by a collector of samples or by an agent, "and a sealed sample thereof given to him." It seems obvious, therefore, that a noncompliance with the provisions of § 5478 will not preclude the state from enforcing the other provisions of the law.

The contention that the state did not prove that the milk from which the sample was taken was not in the possession of the appellant for the purpose of being disposed of as skimmed milk need not be considered, for the judgment will have to be reversed on account of error in giving oral instructions. The court, over the objections of appellant, gave certain oral instructions to the jury, both before and after the argument. This was reversible error. Laws 1909, p. 184, § 1; Rem. & Bal. Code, § 339; *Raynor v. Tacoma R. & P. Co.*, 70 Wash. 133, 126 Pac. 91.

Reversed, with directions to grant a new trial.

MOUNT, C. J., CHADWICK, PARKER, and CROW, JJ., concur.

[No. 10537. Department One. December 6, 1912.]

W. H. GAFFORD, *Respondent*, v. GLOBE TRANSFER AND STORAGE COMPANY, *Appellant*.[1]

EVIDENCE—ORAL EVIDENCE—CONTRACT NOT EXPRESSED IN WAREHOUSE RECEIPT. Where a warehouse receipt was signed by only one of the parties and mailed to the owner of the goods, oral evidence is admissible to prove an oral agreement as to the place where the goods should be stored and that the receipt did not express the agreement.

BAILMENT—WAREHOUSEMEN—SPECIAL CONTRACT — BREACH—WAIVER—QUESTION FOR JURY. It is for the jury to determine whether a bailor's failure to remove goods amounted to a waiver of a special agreement whereby a warehouseman agreed to store goods on the fourth floor of a building, where the bailor, observing them on the first floor, told the manager that the goods were not stored according to agreement, and protested that the first floor was not a good place to store them.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 7, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Totten & Rozema, for appellant.

Walter S. Fulton and *Arthur P. Redman*, for respondent.

GOSE, J.—This is an action to recover damages flowing from an alleged breach of a contract of bailment. The plaintiff prevailed in the court below, and the defendant has appealed.

The admitted facts are, that the appellant was conducting a general storage and warehouse business, in the city of Seattle; that, on the 1st day of September, 1910, it received the respondent's household furniture, goods, and effects in storage in its warehouse, and that they were subsequently damaged by fire on the first floor therein. The respondent offered evidence to the effect that there was an express oral

[1]Reported in 128 Pac. 228.

contract that the goods should be stored on the fourth floor of the warehouse, and that pursuant to that arrangement he delivered the goods to the appellant for storage. On the 8th day of September, the appellant mailed a warehouse receipt to respondent, which recites, among other things:

"Receipt for goods stored . . . at 530 First Avenue South. Seattle, September 1, 1910.

"Received in storage from W. H. Gafford the goods and property enumerated below to be stored and delivered at this warehouse upon return of this receipt, properly endorsed, and payment of charges," etc.

The receipt was received by the respondent in due course of mail. Some six weeks or two months later, the respondent was in the warehouse, observed that the goods were stored on the first floor, and says that he told the appellant's manager that the goods had not been stored according to the agreement; that he was not satisfied with the place where they were stored; that the manager said: "Isn't that a good place to store them?" and that he replied, "No," and protested against it. The manager testified that the respondent on that occasion asked him "why the goods were stored there;" that he explained the reason, and that the respondent "made no protest at the time." The case was tried to a jury and the correctness of the instructions is not questioned.

The appeal presents two questions: (1) Was parol testimony admissible to prove a contract to store the goods on the fourth floor? and (2) if so, Did the respondent as a matter of law waive the right to stand upon his contract?

We think the respondent was entitled to prove the actual contract. He stored the goods pursuant to that arrangement. He asserts that the warehouse receipt which was mailed to him after he had stored his goods does not express the contract. *Windell v. Readman Warehouse Co.*, 30 Wash. 469, 71 Pac. 56; *McCurdy v. Wallblom Furniture & Carpet Co.*, 94 Minn. 326, 102 N. W. 873; 4 Am. & Eng. Ency. Law (2d ed.), 519. In the *Windell* case, the warehouse receipt

was mailed to the bailor after the goods had been received in storage. There, as here, the bailor was permitted to prove the actual contract. The bailee objected to the testimony on the ground that it tended to vary and contradict the terms of the warehouse receipt. In passing upon the admissibility of the evidence, the court said:

"But the warehouse receipt was written and signed by only one of the parties, and it must embody the real contract made between the parties. . . . The warehouse receipt must be based upon the agreement of the parties, or assented to by the plaintiffs. If an oral contract has preceded it, its terms must be embodied in the receipt. The vital question, then, is one of fact. The evidence was heard and weighed by the jury under proper instructions from the court. If the evidence on the part of the plaintiffs is believed, an oral contract was made, and its terms are not embodied in the receipt, and the terms contained in the receipt were not understood or assented to by plaintiffs."

This is but another way of saying that, if the plaintiff's testimony was true, the minds of the parties met upon the oral contract and did not meet upon the matter embodied in the warehouse receipt. It is argued that the *Windell* case is not authority in the case at bar, for the reason that it appeared there that the bailor did not read the receipt, and that there is no such evidence here. It suffices to say that that was not made the basis of the opinion. In the *McCurdy* case, the bailor delivered his goods to the warehouse designated by the bailee. Thereafter the bailor was given a warehouse receipt in conventional form, but which did not specify where the goods were to be kept. Subsequently the bailee transferred the goods to another house, where they were destroyed by fire. In a suit for conversion, an instruction was approved in which the court charged the jury as a matter of law that the bailee obligated himself to keep the goods stored in the building in which they were received, because, as the court said: "The undisputed facts show a specific agreement to store in a designated place," made before the issuance of the warehouse receipt.

Coming to the question of waiver, it is clear that the court would not have been warranted in charging the jury as a matter of law that the respondent had waived his right to insist upon the observance of the terms of the bailment. The question of waiver is one of intention.

"A waiver is the intentional relinquishment of a known right, and there must be both *knowledge* of the existence of the right and an *intention* to relinquish it." *Hoxie v. Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240.

See, to the same effect, *Fairbanks, Morse & Co. v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113; *Stewart v. Crosby*, 50 Me. 130; *Hamilton v. Home Fire Ins. Co.*, 42 Neb. 883, 61 N. W. 93; *Rettner v. Minnesota Cold-Storage Co.*, 88 Minn. 352, 93 N. W. 120. The *Rettner* case was an action for damages for the failure of the bailee to keep a cold storage plant, in which the plaintiff had stored celery, at an even, uniform, and proper temperature. The plaintiff visited the room in which the celery was stored before it was appreciably injured, discovered that the temperature was too high for celery, and called the attention of the defendant's manager to that fact. It was contended that his failure to remove his goods operated as a waiver and an assent that the goods should be kept at such a temperature. It was held that it was for the jury to determine whether there was a waiver, and that the law did not charge the plaintiff with the absolute duty of removing his goods. In *Minor v. Edwards*, 12 Mo. 137, 49 Am. Dec. 121, cited by the appellant, in speaking of the question of an intention to waive a right, the court said:

"If there be a question of intention in the case, whether it be upon a matter of waiver, or other analogous subject, it is undoubtedly the province of the jury to pass upon this as one of fact."

There are doubtless cases where the court would be warranted in charging the jury as a matter of law that there had been or had not been a waiver. This, however, is not

such a case. The question was for the jury, and it has resolved against the appellant.

The judgment is affirmed.

MOUNT, C. J., CROW, PARKER, and CHADWICK, JJ., concur.

[No. 10541. Department One. December 6, 1912.]

EMILLINA ROSELLINI, *Respondent*, v. SALSICH LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES—ISSUES AND PROOF—EVIDENCE—RELEVANCY. In an action for personal injuries through the derailment of a hand car that suddenly left the track, evidence that one of the brasses upon the boxing of the front wheels fell out, just before or at the time the car left the track, is relevant to the issues raised by allegations that the car was old and generally worn out and unsafe to ride upon.

SAME—SAFE APPLIANCES—MASTER'S DUTY TO INSPECT. Where a defective hand car was used on a logging road for the purpose of transporting a track crew from place to place, the duty of inspection and furnishing safe instrumentalities is upon the master, and not upon a member of the crew who was not charged with the positive duty to keep it in repair; especially where several hand cars were supplied for the use of the men.

SAME—CAUSE OF ACCIDENT—EVIDENCE—QUESTION FOR JURY—RES IPSA LOQUITUR. Where a hand car suddenly left the track, and the brasses upon the boxing of one of the front wheels came off just before or at the time the car left the track, and there was some evidence that it was the top brass that came off, which would allow the wheel to go out of place, there is sufficient evidence of the cause of the accident to make a *prima facie* case and to require the defendant, whose duty it was to inspect and furnish safe instrumentalities, to rebut the same by a reasonable explanation of the cause of the accident; and in such a case it is unnecessary to resort to the doctrine of *res ipsa loquitur*.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered January 3, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee on a

[1]Reported in 128 Pac. 213.

logging road through the derailment of a hand car. Affirmed.

Hudson, Holt & Harmon, for appellant.

Bates, Peer & Peterson, for respondent.

CHADWICK, J.—Guiseppe Rosellini and some twelve or fourteen others composed a track gang, and were going from one point to another on hand cars on defendant's logging road. The first car (there were two of them) carried the foreman of the work. The road ran down a grade, describing a curve, and then up a grade on the other side. Just as the second car reached the bottom of the grade and, as is most likely, the crew began to pump for the ascending grade, the hand car left the track, throwing Rosellini to the ground with such violence that he was killed almost instantly. Just after the accident, one of the brasses from the boxing on one of the front wheels of the hand car was picked up by a workman, it having fallen out just before or at the time the car left the track. This action was brought by Rosellini's widow, and from a verdict in her favor, defendant has appealed.

Negligence is alleged in that the hand car was "old, worn out, defective, and in want of repair to such an extent that the whole mechanism, running gear, braces, boxing, and bed were loose and rickety, rendering said car unsafe, and making it extremely dangerous for persons to ride upon it." It is contended that the court erred in admitting evidence that the boxing came out, inasmuch as respondent had not proved that the car was defective in any way as alleged in the complaint. Without following appellant's argument, we think it is enough to say that, in our judgment, there was evidence tending to show that the car was out of repair. The testimony offered was relevant to the issue submitted by the complaint. No error prejudicial to the appellant resulted therefrom.

Appellant relies principally upon two propositions of law: (1) that the doctrine of *res ipsa loquitur* does not apply;

and (2) that the cause of the accident is not shown. We shall not follow the very able brief submitted on behalf of appellant; for, as the case presents itself to us, it may be better answered by a general discussion. The real basis of appellant's argument can be found in proposition (2), "Both inspection and user must have been at the time of the injury in the control of the party charged." § 2509, Wigmore on Evidence, quoted in *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838. In other words, the jury having found the instrumentality contributing to the accident to be defective, was its character such, considering its use, as to relieve appellant of the duty of inspection? In *Cole v. Spokane Gas & Fuel Co.*, 66 Wash. 393, 119 Pac. 831, we said:

"The rule seems well established that an implement of simple structure, presenting no complicated question of power, motion or construction, and intelligible in all of its parts to the dullest intellect, does not come within the rule of safe instrumentalities, for there is no reason known to the law why a person handling such instrument and brought in daily contact with it should not be chargeable equally with the master with a knowledge of its defects."

But that case voices an exception to the general rule; that is, the primary duty of inspection or of furnishing a safe instrumentality for doing the work is upon the master; and no contrary presumption arises unless it is shown by competent evidence that the duty is upon the servant in a given case, or that the character of the instrument and the manner of its use were such as to charge the servant with a knowledge of its defects. In this case a permissive rather than a positive duty of keeping the car in order was shown, if any duty was shown, and respondent is entitled to recover unless we can hold, as a matter of law, that a hand car is an instrumentality of such simple construction as to shift the duty from the employer to the employee. We cannot so hold. The hand car was not, in a strict sense, an instrument used in the work Rosellini was engaged to do. It was merely an incident

thereto. It was, so far as the record shows, used in transporting workmen along the line, and this for the benefit of the appellant. This case is stronger and not unlike the case of *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016. There the servant had been employed as a machinist for twelve years. A part of his duty was to truck heavy pieces of iron and machinery from a lathe. Several trucks were furnished for that purpose, any one of which Graaf might have used. While thus engaged, a wheel dropped off of the truck he was then using, in consequence of which he was injured. The same defense was offered there as here, we said:

"There was no duty of inspection cast upon the appellant, either expressly or by implication; nor was the truck in his exclusive use or control. Its use was a mere incident to his main employment as a machinist. It is fundamental that it is the duty of the master to furnish the servant reasonably safe instrumentalities with which to carry on his work, and to maintain them in a reasonably safe condition. Common observation and experience teach that sound appliances do not break when employed in a proper manner and in the use for which they were designed. If they break when so used, it is a circumstance from which it may be inferred either that they were defective in the beginning, or had become so by use."

It occurred to us in the *Graaf* case, and it so occurs now, that where employees may come in contact with one of two or more machines or instrumentalities (here there were two), that are used only in an incidental way, it would be unreasonable to hold the employees to the strict duty of inspection, which is usually applied where the instrumentality is in the sole charge of, or is being directed by a skilled employee. To so hold we would have to say that Rosellini and all of his fellow servants would have to inspect the hand car which they happened to use every time they got onto it. As is well said in the case referred to: "It is apparent that the respondent did not intend such a waste of time and energy."

Nor can we say that the cause of the accident was not sufficiently shown. Much of appellant's argument is predicated upon the assumption that the lower half of the boxing or bushing came off. If this was so, the case would be extremely difficult; for certain elementary laws of physics would make it highly improbable that the car would have left the track so long as its weight was on the axle. But there is some testimony, and it must have been accepted by the jury, tending to show that it was the top brass or bushing which came off; that, if so, "they would certainly have had some trouble . . . caused by the wheel going out of place as far as it could with the other wheel on the opposite side. . . . the flange of the wheel would be running against the rail." In this class of cases, absolute certainty cannot be required. There must be a point where, if a *prima facie* case is made, the burden shifts. It then became the duty of the defendant to meet this *prima facie* case and offer a reasonable explanation of the cause of the accident. *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870. There being enough in this case to go to the jury, and it having rejected appellant's explanation, we cannot hold, as a matter of law, that the cause of the accident was uncertain or not proved.

We understand this to be a case calling for the application of the doctrine of *res ipsa loquitur*, and will not discuss that principle. We think there is enough in the evidence to show that there was an omission of duty. Appellant insists that the case of *Wilson v. Cain Lumber Co.*, 64 Wash. 533, 117 Pac. 246, is decisive. In that case we held that the master was not bound to exercise more than reasonable diligence to discover a latent defect. Other questions were discussed, but they turned upon the character of evidence offered and have no bearing upon this case.

Judgment affirmed.

MOUNT, C. J., PARKER, CROW, and GOSE, JJ., concur.

[No. 10430. Department One. December 6, 1912.]

THE STATE OF WASHINGTON, *on the Relation of The City of Seattle, Appellant*, v. SEATTLE ELECTRIC COMPANY, *Respondent*.[1]

CARRIERS — FARES — FRANCHISE — RATES FOR SCHOOL CHILDREN — CONSTRUCTION. A franchise requiring a street railway to carry "school children" at half fare applies only to those commonly referred to as school children, and not to students in universities or colleges or schools where a particular branch of learning is pursued; especially in view of our statutory distinctions between "school children" and "students" as found in Rem. & Bal. Code, §§ 4317, 4333, 4366, 4406, 4714.

SAME — CONSTRUCTION BY PARTIES. A franchise ordinance requiring a street car company to carry school children at half fare having been construed by the street car company and the city to apply only to children attending public and private schools, the city cannot later contend that it should be construed to cover students at universities and colleges.

Appeal from a judgment of the superior court for King county, William Hickman Moore, Esq., judge *pro tempore*, entered May 2, 1912, in favor of the defendant, dismissing an action for a writ of mandamus. Affirmed.

James E. Bradford and *H. D. Hughes*, for appellant.

James B. Howe, for respondent.

CHADWICK, J.—This is an action brought by the city of Seattle, to compel the Seattle Electric Company to issue half-fare tickets to pupils attending the state university and business colleges located in the city. The company is operating under a franchise granted in the year 1900, in which it is provided that "school children going to and returning from school shall ride for half fare." It seems to have been assumed by both parties to the franchise, at the time it was granted and for some time thereafter, that the franchise in-

[1]Reported in 128 Pac. 220.

cluded only those children who were in attendance upon the common schools, as defined in Rem. & Bal. Code, § 4406:

"Common schools shall include schools that are maintained at public expense in each school district and under the control of boards of directors. Every common school, not otherwise provided for by law, shall be open to the admission of all children between the ages of six and twenty-one years residing in that school district."

In October, 1908, the superintendent of public utilities, in correspondence with the company, insisted that the grant was for the benefit of school children, and not for the schools, and that it was available to all children, whether attending public or private schools. After some correspondence, the matter was referred by the company to its attorney, who wrote the superintendent of public utilities as follows:

"In my opinion, school children going to and returning from school have the right to ride for half fare, whether such school children are attending the public schools or private schools. The special privilege given by the franchise to school children does not apply to university students, nor to those attending business schools, nor, in my opinion, does it apply to persons attending evening schools."

This solution was satisfactory to both sides. No further question was made of the franchise until this controversy arose. The relator now seeks to extend the meaning of the word "school," as used in the franchise and heretofore accepted by the parties, so as to include all schools which are made a part of our educational system, as well as schools of a private and technical character, such as business colleges, etc.

Relator has made a very able argument, showing that the word "school" is a generic term and in its broad sense must be held to include all schools or institutions, whether of high or low degree, citing 35 Cyc. 811, 813; 25 Am. & Eng. Ency. Law (2d ed.), p. 7, as well as a number of cases, most of which are referred to in the texts. It requires neither argument nor authority to demonstrate the truth of relator's

contention, but if established it cannot be taken as controlling in the case at bar. Here we are called upon to construe a contract, not to define words—to fathom the intent of the contracting parties and to find the sense of the words used. Counsel for relator relies with some assurance upon the case of *School District No. 20 v. Bryan*, 51 Wash. 498, 99 Pac. 28, 20 L. R. A. (N. S.) 1033, saying that:

"This case is worth careful study since it meets the contention made by the Seattle Electric Company and holds that the grammar schools and high schools of this state are included under the heading of 'common schools.' This case would be authority for the street railway company if the franchise provided that tickets should be issued to children attending common schools."

We went no further in that case than to hold that the statute relied on must "measure up to every requirement of the constitution and code of public instruction;" and this being so, that a part of the common school fund should not be diverted to the use and benefit of a normal school. As hereinbefore suggested, we are not in this case construing the cold letter of a statute or measuring the limit of legislative power by reference to the constitution or existing laws, but are called upon to ascertain the intent of the parties to an existing, and we may say, executed contract. It is one of the first rules of statutory construction, applying to contracts as well, that words are to be taken in their common or ordinary meaning. With this rule to guide us, we have no hesitation in holding, there being nothing in the contract indicating an intention to include all who are voluntarily seeking a higher or technical education, that the words "school children" as employed in the franchise, include only those who are commonly referred to as school children, not students of universities or colleges or schools where a particular branch of learning is pursued.

We find assurance for our holding by reference to existing laws. Our educational code speaks of those attending the

state university, the state college and normal schools as "students" (Rem. & Bal. Code, §§ 4317, 4333, 4366); but in chap. 8, § 4406, where our common schools are defined, the legislature adopts the word "children." In § 4714, under the title "Compulsory Education," the law refers to "child" or "children," showing that there is a common acceptation of the words "school children;" and this being so, we must conclude that the parties had it in mind when the contract was entered into. The few cases which have been called to our attention are in line with this reasoning. In *Northrop v. Richmond*, 105 Va. 335, 53 S. E. 962, the court was called upon to construe the meaning of the word "pupils" in a franchise providing for the carrying of pupils at a reduced fare by a street car company. The ordinance as originally proposed provided that the company should place tickets on sale for the accommodation of "children going to and from school." The city council insisted upon the substitution of the word "pupil." The court held the word "pupil" to have a broader meaning, and that it must have been intended to include others than mere school children. The court said that, if the ordinance had been adopted in the terms proposed, it would have been plain and unambiguous, and would have excluded the class of persons who were insisting upon the benefits of the ordinance, they being students at a business college. The court continues:

". . . the phrase 'children going to and from school' would, without doubt have referred to young people in attendance upon institutions of a subordinate character, and in common acceptation would have embraced only places of primary instruction and establishments for the instruction of children."

In *Selectmen of Clinton v. Worcester Consol. St. R. Co.*, 199 Mass. 279, 85 N. E. 507, where a similar contract was considered by the court, the court differentiated between the meaning of the word "school" as applied to institutions of

higher learning and when applied to schools of lesser degree, saying:

"But ordinarily and without something to indicate that a wider meaning was intended to be given to this word, it will not be taken to include such higher institutions of learning as colleges or universities, or institutions for the teaching of trades, professions or business."

In addition to the authorities cited in the cases quoted, the following may be referred to: *Pike v. State Board of Land Com'rs*, 19 Idaho 268, 113 Pac. 447, Ann. Cas. 1912 B. 1344; *Granger v. Lorenzen* (S. D.), 133 N. W. 259; *State ex rel. Dick v. Kalaher*, 145 Wis. 243, 129 N. W. 1060.

There is another rule of construction which courts will not reject, but on the contrary will accept as a certain guide when looking for the intent of the parties to a contract. The parties to this franchise having accepted and given a certain meaning to the words "school children" and fixed their status under it, the company cannot take from the contract, nor can the city add thereto. The contract is executed except in so far as it is measured by time.

We find that the contracting parties meant to use the words "school children" in their common and popular sense, and there being no controlling statute or intervening equity to modify or enlarge the rights of the city or add to the obligations of the company, the judgment of the judge *pro tempore* is affirmed.

MOUNT, C. J., CROW, PARKER, and GOSE, JJ., concur.

[No. 10664. Department One. December 6, 1912.]

JOHN T. HANDSAKER *et al.*, *Appellants*, v. HANS PEDERSEN, *Respondent*, AND FRED J. EITEL *et al.*, *Appellants*.[1]

BILLS AND NOTES—EXECUTION—PRINCIPAL MAKERS—EVIDENCE—SUFFICIENCY. There is sufficient evidence that notes, signed by the defendants in the left hand corner, after they had been signed by others and indorsed for discount, were executed by defendants as principals and not as sureties, where a bank had refused to discount the notes, and only did so on the strength of the signatures of the defendants, who signed and put up collateral for the purpose of getting the notes discounted.

ALTERATION OF INSTRUMENTS—CONSENT TO ALTERATION—AUTHORITY OF JOINT MAKER. One of two accommodation indorsers of a note is not the agent of the other for the purpose of procuring its discount with authority to consent to a material alteration, where they were not partners and had no interest in and derived no benefit from the note or its discount.

SAME—MATERIAL ALTERATION—NEW SIGNERS. Under Rem. & Bal. Code, § 3515, providing that an alteration that changes the number or the relation of the parties is a material alteration, the addition of new signatures to procure their discount is a material alteration, which discharges an accommodation indorser who had no notice of the alteration.

SAME—CONSENT TO ALTERATION—EFFECT. An accommodation indorser who assents to the alteration of a note by the addition of new signers is liable on the note for his contributory share thereof.

INDEMNITY—LIABILITY OF INDORSERS—ORAL PROMISE. An accommodation indorser who orally promised an accommodation signer to pay the note in any event and save such party harmless thereon, is liable on his promise.

EVIDENCE—ORAL EVIDENCE—TO VARY WRITTEN CONTRACT. Proof of an oral promise by an accommodation indorser to pay the note and save another harmless is not inadmissible as varying the written obligation.

FRAUDS, STATUTE OF—DEBT OF ANOTHER—INDEPENDENT PROMISE. An oral promise by an accommodation indorser to pay the note in any event and save another harmless is not a promise to pay the debt of another, within the statute of frauds, but is an independent personal promise.

[1]Reported in 128 Pac. 230.

INDEMNITY—ACTION ON GUARANTY—SCOPE—ATTORNEY'S FEES PAID WITHOUT SUIT. An action by accommodation signers, against an indorser who had agreed to pay the note in any event and save the plaintiffs harmless, is upon the promise and not upon the note, and no recovery can be had for the attorney's fee stipulated for in the note, where the plaintiffs had paid the note without suit or costs.

INDEMNITY — ACTION ON GUARANTY—DEFENSES. In an action against an accommodation indorser upon the promise to pay the note in any event and save another harmless, it is no defense that plaintiff failed to prove a claim in bankruptcy against the estate of the makers; since the same obligation rested upon the defendant.

Cross-appeals from a judgment of the superior court for King county, Main, J., entered July 22, 1912, upon findings in favor of one of the defendants, and against the others, in an action on contract. Affirmed on plaintiffs' appeal and modified on defendants' appeal.

Geo. McKay, for appellants.

Geo. B. Cole, for appellants Eitel *et al.*

Tucker & Hyland (*Aubrey Levy*, of counsel), for respondent.

CHADWICK, J.—One Clark O'Bryan was promoting an irrigation scheme, near North Yakima, Washington. Plaintiffs Handsaker and wife were interested therein, Mr. Handsaker being vice president of the company. Being in need of funds to carry on the development work, O'Bryan met defendant Eitel, and upon Eitel's solicitation Pedersen agreed with Eitel that they would loan their credit to the irrigation company to the extent of $5,000. Notes were accordingly made, each in the sum of $2,500, payable to the order of Hans Pedersen and Fred J. Eitel, and these were signed: "North Yakima and East Selah Irrigation Company by Clark O'Bryan, president." Eitel took these notes to a bank at North Yakima, and offered them for discount upon the indorsement of Pedersen and Eitel. The bank declined to accept the paper. This fact becoming known to Mrs. Handsaker, she went to the bank and personally offered the credit

of plaintiffs and certain collaterals owned by them, and thereafter plaintiffs signed the notes and pledged their securities; whereupon the bank advanced the money. Pedersen was not present when the notes were signed by plaintiffs, and knew nothing of their relation thereto until after the last payment of interest made by him, which was on the 3d day of July, 1910.

The money realized on the notes was deposited in the bank, $2,000 to the credit of Eitel and $3,000 to the credit of O'Bryan for the use of the company. One thousand five hundred dollars of the money credited to O'Bryan was paid to plaintiffs to take up an obligation owing by the company. Eitel had no interest in the $2,000 deposited to his credit. One Bryant seems to have been in charge of some tunnel work for the company. The money was borrowed to meet some debts of the company and to complete the tunnel. Bryant was unwilling to trust O'Bryan, and agreed to continue the work only upon condition that Eitel would see that he was paid. Bryant proposed that he should go ahead with the work, which he did, and Eitel gave him upon demand from time to time varying sums of money until the $2,000 was exhausted. Eitel had no interest either in the work or in the money. He became rather a voluntary trustee for the company.

It is claimed by plaintiffs that they did not become makers on the note, but only indorsers for the debt of Eitel and Pedersen, and then only upon the verbal assurance of Eitel that he and Pedersen would pay the debt. The fact that plaintiffs signed the notes in the lower left hand corner of the note is relied upon as a circumstance indicating a purpose not to be bound as makers. But this circumstance, if worthy of consideration at all, is overcome by the voluntary offer of their signatures and securities by plaintiffs after the loan had been turned down, and by the testimony of Mr. Fechter, the president of the bank, who transacted the business at the time. He says:

"I made the loan on the strength of their signatures and the mortgage security. . . . Q. You insisted on having them sign as makers of the note? A. Yes. . . . Q. And it was agreed then and there, was it not, that if Mr. and Mrs. Handsaker would put up this collateral security, that you would make the loan or discount the notes so to speak? A. Yes. Q. Upon the Handsaker signature? A. Yes."

From these facts, the court concluded:

"That the signature of the plaintiffs to the said notes was a material change in the legal effect of said notes; that the said defendant Pedersen did not consent to said change, and never waived the same, and that he is released and a judgment of dismissal should be entered in his favor, and that the plaintiffs shall recover from defendant Eitel."

Judgment was entered accordingly. Plaintiffs have appealed from the judgment in favor of Pedersen, and Eitel from the judgment against him. The parties will be referred to as plaintiffs, Eitel, and Pedersen.

The judgment in favor of Pedersen is sought to be overturned upon the theory that Eitel was agent for Pedersen, and having authority to discount the note, was empowered to do everything necessary to procure the money. Without discussing the obligation of a maker under such circumstances, we are quite clear that Eitel was not Pedersen's agent with any such authority. They were not partners. They had no interest pecuniary or otherwise in the company. They had become accommodation parties only.

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person." Rem. & Bal. Code, § 3420.

The proceeds of the note were not and did not go to them, nor were they used for their benefit; all of which plaintiffs knew at the time they became parties to the instrument, notwithstanding their present contention that:

"Eitel and Pedersen procured the plaintiffs to be accommodation parties as a means to secure their ends and purposes; that is, the discount of the notes; and that Eitel found it necessary to use the pledge of the plaintiffs' security and the use of their names."

A resort to fundamental principles makes it plain that, up to the time the plaintiffs signed the note it was only a piece of paper. No money had been advanced and no credit advanced. It was without consideration, present or prospective. It had been made with a definite purpose, and had found no favor in the current of trade. The money that was finally paid thereon was not paid on the faith and credit of the note, but upon the personal and collateral security of the plaintiffs. Hence, it follows that the addition of the names of plaintiffs as makers was such a material alteration under § 3515 as to excuse and discharge Pedersen, he having no notice of the alteration. An alteration which changes "(4) the number or the relations of the parties" is a material alteration. Rem. & Bal. Code, § 3515.

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to alteration, and subsequent indorsers." § 3514.

Affirming the judgment in favor of Pedersen as we do, we shall not go into the reasons for the rule, but will content ourselves by quoting from Mr. Daniel on Negotiable Instruments, § 1375:

"It will be no answer to a plea of alteration that its operation is favorable to the parties affected by it, whether in lessening the amount to be paid, enlarging the time of payment, or otherwise. No man has a right to vary another's obligations at his discretion, whether for his good or ill. It ceases when varied to be that other's act, and it suffices for him to say, '*Non haec in foedera veni.*' It may be questioned whether or not prolongation of time, decrease of amount, or other apparently beneficial alteration is really so. A debtor may make provision for payment on one day, and not be

ready on another. A decrease of the amount destroys the identity, and confuses the traces of his obligation, and every reason of policy and principle forbid that the laws should tolerate tampering with the rights and engagements of others."

"As to the parties to a bill or note, any change in the personality, number, or relations of the parties is, as a general rule, a material alteration. Thus, where C., member of the firm of C. & Co., obtained an accommodation indorsement to his individual note, and then added '& Co.' to his signature, thus making it his firm's note, it was held a material alteration. When there are several makers or co-sureties, the addition of another maker or co-surety constitutes a material alteration; for the addition of another maker destroys the integrity of the original contract; and the addition of another co-surety changes the right of the sureties in respect to the proportion of contribution for which each is liable to the others. And the erasure of the name of one of two drawers or makers, or payees, who have indorsed the paper, or of one of several co-sureties, or the name of the payee and inserting another, is likewise a material alteration." Id., § 1387.

See, also, 2 Cyc. 179. Many cases will be found in these texts supporting and sustaining the law as declared in our statute above cited.

Eitel, we find, assented to the alteration and would therefore be bound, as between the remaining parties, to pay his contributory share of the note irrespective of his oral promise. Passing now from Eitel's obligation as an accommodation party, and considering his oral promise to pay the note in any event and to save plaintiffs harmless, while there is no equity in plaintiffs' case, the testimony sustains this finding of the trial judge, and we reluctantly hold that Eitel is bound by his promise. It is contended that plaintiffs cannot limit their liability by showing an oral promise or contract that they were not to be bound to pay the note according to its tenor. *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751, and *Bradley Engineering & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. 1127, are relied on. The

rule there announced would apply if this suit were maintained by the payee or owner of the note. Here we have a suit upon an independent contract between accommodation parties, and the rule which denies the right to set up an oral contract limiting or destroying the written obligation cannot be raised as a shield; for the contract of the accommodation parties is not evidenced by the note, but rests in parol. Nor is the promise, as is suggested, a promise to pay the debt of another. It is a promise personal to the promisor.

"It is a general rule that the true relation subsisting between the several parties bound for the performance of a written obligation may be shown by parol evidence. An unwritten agreement made between such parties prior to, or contemporaneously with, their executing an instrument as sureties, by which one promises to indemnify the other from loss, may be proved by parol, and the surety who made the agreement cannot, in such case, recover contribution from the other. . . . There is no agreement between the sureties contained in the obligation signed by them. The agreement is between the obligors and the obligee. As between the various sureties there is no written agreement; there is only an equitable presumption, raised by the fact of payment, that the sureties ought to contribute equally for the default of the principal. This equity can be rebutted by parol." 1 Brandt, Suretyship Guaranty (3d ed.), § 287.

See, also, 32 Cyc. 283, 289; *Craythorne v. Swinburne*, 14 Ves. 160; *Hunt v. Chambliss*, 7 Smedes & Mar. (Miss.) 532; *Rae v. Rae*, 6 Irish Ch. 490; *Barry v. Ransom*, 12 N. Y. 462; *Paulin v. Kaighn*, 27 N. J. L. 503; *Cox. v. Waggoner*, 5 Sneed (Tenn.) 542; *Thomas v. Cook*, 8 B. & C. 728, 7 L. J. K. B. O. S. 49, 3 M. & R. 444, 15 E. C. L. 358.

We do not understand that plaintiffs' have any right of action upon the note. They can recover only on an express or implied promise. The complaint states a cause of action upon the special promise and not upon the note, as both parties and the court below seem to have assumed. The promise being only to save harmless, it follows that there was no warrant in law for the allowance of an attorney's fee

as provided in the note, for plaintiffs paid the note without suit or costs and the measure of their recovery is the amount paid and no more.

It is finally insisted that, whereas the irrigation company was thrown into bankruptcy, and a bid for the corporate assets purporting to be sufficient in amount to cover all proved claims was accepted by the court, plaintiffs should not recover because they failed to prove their claim. We would be glad to so hold, but are again met by the settled law. The same obligation rested on Eitel. Having failed to meet it, he cannot now complain if plaintiffs rely and insist upon the performance of his personal contract.

The judgment against Eitel will be modified by striking out the sum of $500 allowed as attorney's fees. In all other respects the judgment is affirmed. Eitel and Pedersen will recover their costs in this court.

PARKER, CROW, and GOSE, JJ., concur.

[No. 10320. Department Two. December 7, 1912.]

JOHN W. HEAL, JUNIOR, *et al.*, *Respondents*, v. EVANS CREEK COAL & COKE COMPANY *et al.*, *Defendants*, AUGUST TUCKER *et al.*, *Appellants*.[1]

ACTIONS—CONSOLIDATION—TRIAL—JUDGMENT. It is proper to consolidate an action for the foreclosure of a mortgage and actions to foreclose laborers' liens on the same property, and to enter a single decree defining the rights of the respective parties.

APPEAL—REVIEW—DISCRETION. Failure to order a sale of mortgaged property in parcels is not reversible error where abuse of discretion is not shown by the record.

MORTGAGES—VALIDITY — RECORDING — FUTURE ADVANCES — SUBSEQUENT LABOR LIENS. A mortgage to secure future advances is valid and takes precedence over laborers' liens for services performed after the mortgage is recorded.

[1]Reported in 128 Pac. 211.

MECHANICS' LIENS—NOTICE—SERVICE. Under Rem. & Bal. Code, § 1150, a copy of the notice of a laborers' lien must be served upon the employer within thirty days after the same is filed for record, or the lien cannot be enforced.

CHATTEL MORTGAGES—VALIDITY—FAILURE TO RECORD—CREDITORS WITHOUT LIENS. The invalidity of a chattel mortgage by reason of failure to record it, valid as between the parties, cannot be asserted by creditors who had acquired only liens against the real property of the mortgagor.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 6, 1911, upon findings in favor of the plaintiffs, in an action to foreclose a mortgage, after a trial on the merits. Affirmed.

H. W. Lueders, for appellant Tucker.

Brady & Rummens, for appellant Burke.

West & Wright and *Peters & Powell*, for respondents.

FULLERTON, J.—On June 28, 1908, and for some years prior thereto, the defendant Evans Creek Coal & Coke Company operated certain coal mines, situated in Pierce county. The mines were located partly on its own property and partly on lands belonging to others on which it held leases. One John A. Wood was an officer of the company and its principal stockholder. During the time the mine was being operated Wood advanced for the use of the company large sums of money and indorsed its paper at neighboring banks for other large sums. On the date above given, the company gave to Wood a mortgage upon all its property, both real and personal, conditioned to secure the money already advanced, to protect him on his liability as indorser of the company's notes, and to secure such future advances as he should from time to time make to the company. This mortgage was seasonably recorded as a real estate mortgage, but was never filed as a chattel mortgage. After receiving the mortgage, Wood assigned it to the National Bank of Commerce of Tacoma, to secure a note of $24,000 owing the bank by the coal company on which he was indorser. Wood died

in the spring of 1910, being then domiciled in the state of Pennsylvania. The respondent Samuel L. Wood is his son, and was named in his will as executor thereof. After Samuel L. Wood became executor, he took up in his individual capacity the note for $24,000 from the National Bank of Commerce and received from the bank an assignment of the mortgage executed by the coal company to John A. Wood, and in his capacity as executor assigned all of the claims of the estate of John A. Wood against the defendant coal company to the respondent, John W. Heal, Jr.; the assignment, however, was made solely for the purposes of enforcing the collection of the claims, it being conceived that a foreign executor did not have capacity to sue in this state.

Subsequent to the death of John A. Wood, the appellants Tucker and Burke performed labor for the defendant Evans Creek Coal & Coke Company, at certain fixed wages, and filed laborers' liens on the property of the company to secure the several amounts due them. These claims were seemingly filed under the provisions of chapter 4 of title 8 of Rem. & Bal. Code, but neither of the claimants served the notice required by § 1150 of that chapter. The liens, however, are concededly valid as mechanics' liens under chapter 3 of the same title. On December 10, 1910, the appellants brought separate actions to foreclose their liens. On January 20, 1911, the respondents Heal and Wood brought a joint action to foreclose the mortgage, each claiming certain of the indebtedness secured thereby. The appellants Tucker and Burke were made parties defendant to the foreclosure action, and subsequently all three actions were consolidated. After such consolidation, the appellants filed separate answers to the complaint of the mortgage holders, claiming that their liens upon the mortgaged property were first and superior to the lien of the mortgage. On the issues thus made, a trial was had upon the merits of the action, at the conclusion of which the court adjudged that the mortgage of the respondents was a first and superior lien upon all

of the mortgaged property to the liens filed by the appellants Tucker and Burke, and entered a decree directing that the property be sold and the proceeds of the sale applied first to satisfaction of the mortgage, and second to the satisfaction of the appellants' liens; awarding to all of the parties judgment over against the corporation for any deficiency that should remain after applying the proceeds of the sale of the mortgage property to the satisfaction of the amounts found to be due to each of them. From the decree, the lien holders appeal.

The appellant Tucker first complains of the order consolidating the several actions for trial, and of the form of the decree, contending that he should have been awarded a separate decree for the amount due him unconnected with the decree of the other parties. But the court committed no error in the matters of which complaint is here made. All of the parties claimed liens on the same property. These claims were antagonistic and adversary to each other. Manifestly, therefore, their rights could only be determined in one proceeding. And it being proper to consolidate the cases, it was of course proper to enter a single decree defining and decreeing the respective rights of the parties.

It is next objected that the court erred in refusing to decree that the property be sold in separate parcels; but we are unable to find from the record whether or not such a direction could have been properly made; that is to say, the record does not disclose sufficient facts with relation to the situation of the property to enable us to say that it could be sold advantageously in separate parcels. In fact, what is disclosed seems to indicate to the contrary. But however this may be, there is nothing to show an abuse of the trial court's discretion in this respect.

It is next objected that the advancements made to the use of the mortgagor by the mortgagee and his assignees thereunder were not secured by the security clause in the mortgage, and that hence the court erred in allowing these sums

as a part of the mortgage debt. The mortgage clearly provided for future advances on the part of the mortgagor, and for the security of such advances by the mortgaged property. Such mortgages are valid in this state, and create a priority of lien over that of mechanics and materialmen, if recorded prior to the performance of the service or the furnishing of the materials for which the lien is claimed, even though the advancements be made subsequent to the time the liens are filed. *Home Sav. & Loan Ass'n v. Burton*, 20 Wash. 688, 56 Pac. 940. In this case the advancements were made prior to the performance of the services for which the liens are claimed, and for a much stronger reason are prior thereto.

The appellant Burke assigns that the court erred in refusing to enter a personal judgment in his favor against the respondent Samuel L. Wood, contending that at the time he performed the services for which his lien is claimed Wood was in possession of the property as mortgagee, and that such services were performed at the personal request of Wood, and on his promise to pay therefor. The appellant testified to facts tending to support these contentions, but his testimony was contradicted by that of Wood. Moreover, it was shown that Wood did not become the holder of the mortgage until after the appellant had performed his services, and that in the complaint in the independent action brought to foreclose his lien the appellant did not assert a personal liability on the part of Wood. We are unable to say, therefore, that the evidence on this question preponderates in favor of the appellant, and hence we are constrained to follow the ruling of the trial judge.

Both appellants assert priority for their liens over the mortgage in virtue of the provisions of chapter 4 of title 8 of the code (Rem. & Bal. Code, §§ 1149-1153). But we are unable to find that they complied with the requirements of this chapter of the code. It is necessary to the validity of a lien under these sections of the statute that a

copy of the lien notice be served upon the employer within thirty days after the same is filed for record. Rem. & Bal. Code, § 1150. The record fails to show that this provision of the statute was complied with; and without such a showing, we could not hold the liens superior to a prior recorded mortgage, even were we to concede that a compliance with the statute would confer such a lien; a question we do not here decide.

Finally, it is contended that the court erred in allowing the mortgagees a lien upon the personal property of the mortgagor. The ground of this contention is that, notwithstanding such personal property was covered by the mortgage, the mortgage was void as to creditors of the mortgagor, and subsequent encumbrances in good faith, because not recorded in the manner mortgages upon personal property are required by the statute to be recorded. But we think the appellants are not in a position to question the right of the respondents to foreclose upon this property. Whether properly recorded or not, the mortgage was valid as between the mortgagor and mortgagee, and it is only creditors who have acquired some form of lien upon the mortgaged property that can question the right of the mortgagee to foreclose against such mortgaged property. Jones, Chattel Mortgages (3d ed.), §§ 238, 245; *Morse v. Morrison*, 16 Colo. App. 449, 66 Pac. 169; *Youngberg v. Walsh*, 72 Kan. 220, 83 Pac. 972. Here the appellants had acquired no such lien. The liens filed by them and which they sought to foreclose affected the real property only of the mortgagor.

The judgment appealed from will stand affirmed.

MOUNT, C. J., MORRIS, ELLIS, and MAIN, JJ., concur.

[No. 10697. Department Two. December 7, 1912.]

O. T. LARSON, *Respondent*, v. G. J. KIEBURTZ *et al.*, *Appellants*.[1]

MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISKS—ASSUMING DANGEROUS POSITION. A tramway repairer assumes the risks where, for his own convenience, he rode on a loaded car not intended for passengers or employees to ride on; and he therefore cannot recover although the jury found that the engineer was negligent in the operation of the engine, his acts only endangering property and in no way affecting the safety of any place provided for employees to work.

SAME—FELLOW SERVANTS—ENGINEER AND TRACK WORKER ON TRAMWAY. An engineer operating a tramway engine and a tramway repairer, whose duty frequently took him to the engine house where he had every opportunity to observe the engineer in his work, are fellow servants, in regard to work in which the repairer was not under the control of the engineer, and with respect to matters not affecting the safety of the working place.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for King county, Myers, J., entered May 8, 1912, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by an employee on a tramway. Reversed.

Preston & Thorgrimson and *Peters & Powell*, for appellants.

Edward Judd and *George A. Clark*, for respondent.

MORRIS, J.—In September, 1911, appellants were engaged in the construction of a reservoir at Seattle, and respondent was in their employ. This reservoir was being constructed on Beacon hill some distance south of the city, and in order to best assemble the material used in the construction, appellants built a tramway from tide water to the reservoir site. This tramway was about a half mile in length. Its eastern end was at an elevation of three hundred and eighteen

[1]Reported in 128 Pac. 216.

feet. At this end was an engine which operated a cable, to which two tramcars were connected in such a manner that, when one car was at the eastern end, the other would be at the western end. These cars ran upon a single track and passed each other on a switch midway between the termini of the track. The cable ran around a drum at the eastern end and a sheave wheel at the western end. At the point where the switch was located, the track ran for a short distance upon a hill, having an elevation of about 150 feet. Between this hill and the eastern end there was a hollow or depression. The loaded cars coming up the hill would be first seen by the engineer controlling the movement of the cable when they reached the location of the switch upon the first hill. After passing over the switch and proceeding a short distance, the cars and track dropped about one hundred feet into the hollow between the switch and the engine house, passing out of the engineer's view, until they reached the second hill at the reservoir site. The engineer could tell the location of the ascending car by the pull on the cable, and was thus enabled to control its speed when rounding the hill for the switch and dropping down into the hollow. To hold the cable in place, sheave wheels were placed along the track at intervals. The switch was so constructed that the ascending car would take the north track and the descending car the south track. The flanges of the car wheels would push over the inside rails at the switch as they passed over, and the rails would remain in that position until the car would strike them on its return, so that each car as it passed the switch points would set them in proper position for its return trip. In this way the ascending car always took the north track.

Respondent had been in appellants' employ since the previous March. His work was to go over the track, see that it was in proper shape, making necessary repairs if he could, and if not, report the need to appellants. It was also his duty to oil the sheave wheels, the rollers and switch points,

and see that everything connected with the track was in good working order. On September 2, respondent reached his work about seven a. m., and starting at the west end of the track, walked along and upon the track to the eastern end, oiling the sheaves and rollers as he went along. He reached the engine house about 8:15 a. m., where he found the engineer and fireman. He remained here a short time, when he was requested by the fireman to get him a bottle of whiskey. He then went down the tramway to the western end, intending also, as he testifies, to get a wooden cleat and some nails and fix a roller he had discovered on his up trip needed repairing. This roller was in the hollow between the switch and the engine house. Arriving at the lower end, he went to a saloon, purchased the whiskey, obtained the wooden cleat and the nails, and got on a loaded car which was about to ascend the hill. These cars were not intended for any sort of passenger service, and Smith, one of the appellants, testifies that on two occasions he had expressly warned respondent against riding on them because of the danger. This is denied by respondent. There is also evidence to the effect that the employees in going up and down the hill were warned against riding on the cars; also evidence that, irrespective of this warning, they frequently rode in both directions. Placing his bottle of whiskey and the cleat upon the loaded car, with the nails in his pocket, respondent got on the front end of the car, with his back to the direction in which the car would move, standing on a large wire cable attached to the car for the purpose of connecting it with other cars, and leaning against the body of the car and holding on with hands, started up the incline. When the car came to the switch, instead of taking the north track as it should, the car took the south track. Respondent, with his back to the direction in which he was going, could not see this, and was not aware that anything was wrong until, as he says, he felt the jerking of the car, when he looked around and, as alleged in his complaint, seeing that the cable was

thrown out of place and assuming something would break and create a dangerous situation, he jumped from the car and was struck by the cable, suffering the injuries complained of. In his testimony he says, when he felt the car jerking, he looked around and just then a roller broke loose from the north track and hit him on his left knee, and knocked him off the car in between the cables on the north side of the car, and that he was caught up by the cables and thrown about fifteen feet to the north of the track.

There are numerous charges of negligence in the complaint, but in view of the answers of the jury to special interrogatories submitted to them, only one need be referred to, and that is that the jerking of the car "was caused by the careless, incompetent and negligent manner in which the engine in the power house was handled," coupled with an allegation that the engineer then in charge of the engine was incompetent. In returning a general verdict in respondent's favor, the jury, in answering the special interrogatories, found that the negligence of the appellants causing the injury was in the employment of "an incompetent engineer," who "was incompetent in respect to not giving his entire attention to the handling of the engine when the cars in question were approaching to and entering the switches on the day of the accident," and in "not checking sufficiently the velocity of the cars upon their advent at the switch." Appellants in appealing allege a number of errors, but we think the case must be disposed of in reviewing but one of them, and that is, Did the trial court err in denying the motion for judgment notwithstanding the general verdict?

At the time of the accident, there were three men in the engine house, Stead the engineer, Jackson the fireman, and Hargreaves an inspector for the city. Respondent produced Jackson and Hargreaves to describe the conduct of the engineer at the time, and appellants produced Stead in their behalf. Jackson says that Stead and Hargreaves were

engaged in conversation, Stead looking towards the south; that his first intimation that there was anything wrong was the stopping of the engine. Stead then tried to move the engine by reversing it in order to ascertain if a car was off the track, which effort failed and he then started down to ascertain the trouble. Hargreaves says that, as the cars approached the switch, Stead slowed up the engine, and the engine suddenly stopped as though it had been thrown to a dead center; that the engineer was startled and threw on the brake, and then released it and attempted to start the engine, but it refused to turn over, and he then set the brakes. The engineer says he slowed up the engine as the cars approached the switch, when he felt a jerk of the cable and immediately stopped the engine, and telling Hargreaves "there is something wrong," started the fireman down the track. The only testimony in the case, therefore, is that the engine was slowed up as it approached the switch.

Assuming, however, since the jury have so found, that the engineer was not giving his entire attention to the engine as the cars approached the switch, and that he did not sufficiently check the cars as they entered the switch, it would establish the fact that, in failing so to do, he acted carelessly and negligently; and while his careless and negligent acts in these respects might have endangered the property of his employers, there was nothing to indicate that they were in any manner affecting the safety of any place in which respondent or other employees might be working. Respondent had no duty to perform which necessitated his riding upon this car. There is nothing in this case from which it can be held that it was the duty of the engineer to handle his engine for the purpose of protecting the safety of employees upon the car upon this trip. If respondent chose to get upon this car, it was his voluntary act, for his own convenience, and not in the discharge of any duty imposed upon him by appellants. These cars were not intended nor provided for employees to ride upon. If they

choose to do so, they must assume in so doing responsibility for their own safety. The law imposes upon the master the duty to furnish the servant with a reasonably safe place in which to do his work and, as is said in *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765, this duty is not confined alone to the place where the work is in progress, but extends to all the instrumentalities and appliances which, from the nature of the work, directly affect its safety. This rule, however, does not cover such a case as this, where the servant is unnecessarily making use of an instrumentality for his own convenience, to save himself the labor of climbing this hill; and when he does so, he becomes his own insurer, and assumes the risk of his act. The fact that other workmen did the same thing does not change the situation.

There is another legal barrier to any recovery by respondent. He and Stead were fellow servants under all testing rules. Stead was in no manner or degree respondent's vice principal, neither in the character of his work nor under any authority conferred by the common master. Respondent's duty was to inspect the tramway, keep it in proper repair, report needed repairs, oil the wheels and rollers, and other duties of a like nature, none of which took him upon the tramcars or necessitated his presence there. In the performance of this duty, he was frequently at the engine house when cars were ascending and descending, and had every opportunity to observe the attention Stead gave to his work and his manner of performing it. It might be presumed he paid no attention to Stead, because he knew that, so long as he kept within the path appellant had marked out for him to follow, Stead's care or lack of it would in no wise affect him. We have recently held, in *Lackey v. Big Creek Lumber Co.*, 70 Wash. 619, 127 Pac. 190, that, under the facts there developed, an engineer and fireman in the same engine room were not fellow servants; but that because of the fact that the fireman was un-

der the superintendence and control of the engineer and subject to his order and direction while performing his work, the engineer would be a vice principal. We have no such facts developed here, nor anything upon which any assumption of them might be founded. While we have no case where persons standing in the identical position to each other as is here shown have been held to be fellow servants, the following cases from this court announce rules and declare relations that are applicable: *Hughes v. Oregon Imp. Co.*, 20 Wash. 294, 55 Pac. 119; *Hart v. Cascade Timber Co.*, 39 Wash. 279, 81 Pac. 738; *Larsen v. Covington Lumber Co.*, 53 Wash. 146, 101 Pac. 717; *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 480; *Hage v. Luedinghaus*, 60 Wash. 680, 111 Pac. 1041.

In *White v. Kennon*, 83 Ga. 343, 9 S. E. 1082, the engineer on a tramroad and a track-repairer were held to be fellow servants, a similar situation to that here disclosed. In Labatt on Master and Servant, § 498, note d *et seq.*, many similar illustrations are given where the relation of fellow servants has been sustained.

For these reasons, we are of the opinion that the motion for judgment should have been sustained. The judgment is reversed and the cause remanded with instructions to dismiss the action.

MOUNT, C. J., ELLIS, and MAIN, JJ., concur.

FULLERTON, J., dissents.

[No. 10604. Department One. December 12, 1912.]

E. F. FURMAN *et al.*, *Appellants*, v. THE BON MARCHE *et al.*, *Respondents*.[1]

CONTINUANCE—ABSENCE OF PARTY—DISCRETION. It is not an abuse of discretion to refuse a continuance, where two days' time was granted to take the deposition of the absent party.

APPEAL—REVIEW—WAIVER OF ERROR. Error in refusing a continuance is waived where the party thereupon took a voluntary dismissal.

ATTORNEY AND CLIENT—AUTHORITY—DISMISSAL OF ACTION. An attorney of record may enter a voluntary dismissal of the action which is binding upon the client.

JUDGMENT—ENTRY NUNC PRO TUNC. Where no formal judgment was entered at the time the plaintiff took a voluntary dismissal, a formal judgment may later be entered *nunc pro tunc*.

Appeal from an order of the superior court for King county, Tallman, J., entered March 16, 1912, denying an application to vacate an order of dismissal and for leave to file an amended complaint. Affirmed.

W. F. Hays and *Jackson Silbaugh*, for appellants.

Preston & Thorgrimson, for respondents.

PER CURIAM.—This action was begun on December 8, 1908, and was brought on for trial on May 12, 1909. An application was made by plaintiffs for a continuance. Instead of granting a continuance, the court gave two days' time and ordered the deposition of the absent party to be taken. At the expiration of the time limited, the attorney for plaintiffs took a voluntary dismissal without prejudice. On March 2, 1912, plaintiffs, by their present counsel, made a motion, supported by affidavits, asking the court to set aside the order of dismissal; the grounds of the motion being that the plaintiffs had no knowledge of the order of the

[1]Reported in 128 Pac. 210.

court until some time in the month of January, 1912; that they did not, nor did either of them, authorize the dismissal of their case, and that no judgment of dismissal was entered. They further ask leave to file an amended complaint, saying that the full extent of the injuries suffered by one of the plaintiffs because of the alleged tort of the defendant was not known at the time the action was begun. When the motion came on for hearing, it was found that no order had been formally entered in the journal at the time the case was dismissed, although it appears by the minutes of the court then recorded that an order of dismissal was signed the day after the order was made.

After a hearing upon the motion and the evidence offered in support and in contradiction thereof, the judge, who was the same judge who had granted the order of dismissal and who has certified the record, stated that he has an independent recollection of the case, and that he "believes without doubt," as the attorneys who appeared both for plaintiffs and defendant at that time testify, that one of the plaintiffs was present at the time the order was made. The presiding judge then invited the present counsel for defendant to present an order to be entered *nunc pro tunc*.

It is assigned that the court erred in refusing to vacate the order dismissing the action, and in refusing to allow plaintiffs to file an amended complaint.

Counsel discusses the discretion of the court in refusing to grant a continuance in May, 1909. We shall not follow their argument or refer to the evidence filed at that time. There was clearly no abuse of discretion; or if there was, the error was waived when a voluntary dismissal was asked and granted.

Although it be assumed that appellants did not know of the order which was invited by their then attorney, it does not follow that they can attack it because of their ignorance of it. Their attorney had full power to represent them in

all matters of practice, and they were, and are, bound by his conduct.

"As the dismissal of a suit does not bar the bringing of another for the same cause of action, the attorney of record has implied authority to discontinue an action if he sees fit." 4 Cyc. 936.

Nor was there any abuse of discretion in entering the order *nunc pro tunc*. A general judgment so noted would bar another action and put in motion the statute fixing the time within which an appeal must be taken. *Wooddy v. Seattle Elec. Co.*, 65 Wash. 539, 118 Pac. 633. As between the parties, no motion for a new trial having been made, the record was complete and final. We understand the test in a case of this kind to be, whether the record as written at the time could have been pleaded in bar as another action. The judgment being one of dismissal without prejudice, it is certain that it could not have been. Appellants' remedy was by a new action. They are in no way prejudiced by the act of the court in making formal that which was merely informal.

Judgment affirmed.

[No. 10347. Department One. December 12, 1912.]

FRANK HANFORD *et al.*, *Respondents*, v. TOLEDO FIRE & MARINE INSURANCE COMPANY, *Appellant*.[1]

INSURANCE—CANCELLATION OF POLICY—RETURN OF PREMIUMS—AGENTS' AUTHORITY — RATIFICATION — PRESUMPTION AS TO POLICY. Where insurance agents cancelled all outstanding policies and sent each policy holder, as return premium, a *pro rata* amount figured on the policy and premium if it had run the full term, at the same time notifying the company, which ratified the cancellation and return of premiums to the extent of the short rate, the acts of the agent are ratified and the company cannot insist on a settlement with the agents based on a short rate basis; it being presumed, in the ab-

[1]Reported in 128 Pac. 235.

sence of anything to the contrary, that the policy could not be cancelled by the company without returning a *pro rata* of the unearned premiums.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 2, 1912, in favor of the plaintiffs, in an action by agents to recover refunds paid to policy holders upon cancellation of insurance policies. Affirmed.

Ballinger, Battle, Hulbert & Shorts (*Wm. J. Claassen*, of counsel), for appellant.

Bausman & Kelleher, for respondents.

CHADWICK, J.—Plaintiffs were the agents of the defendant in the city of Seattle, and had issued a line of insurance for it. The stability and standing of the company having been questioned, plaintiffs, of their own motion, cancelled all outstanding policies and sent to each policy holder a return premium. The amount returned was the *pro rata* or ratable amount figured on the policy and premium if it had run for the full term. On the same day, plaintiffs wrote defendant as follows:

"We are forwarding this day under separate cover to the Lumber Insurers General Agency of New York, policies, per the enclosed lists which we have canceled as of November 2d, except those marked 'not received.' We have also terminated your liability under those so marked as of the same date. These policies have not yet been received from the assureds, but will be forwarded as soon as they come into our possession. All liability, however, as stated above, ceased at noon November 2d. The enclosed lists show return premiums under policies."

To this letter, defendant replied:

"We would be pleased to receive a statement of your account to that date, and any policies that you may have authoritatively canceled. You, of course, had the right to cancel any and all policies on the basis of short rates, but you had no authority to cancel all our policies on a pro rata

basis. When the policies are received, your statement of accounts and supplies, we will ascertain the amount of return premiums there would be on a short rate basis and if it exceeds the amount due from your agency, we will send you a draft for the balance."

The parties were unable to agree as to the amount due; plaintiffs insisting that, having canceled the policies, it was their duty to return the *pro rata* amount of the premium; defendant insisting that it was liable only for the amount due on the canceled policy, computed at what is called among insurance men a "short rate" premium. This we understand to be an amount equal to the premium if the policy had been originally written for the time elapsing between the date of the policy and the date of cancellation. We believe these rates to be invariably higher than the stated premiums. Plaintiffs accordingly brought this action, demanding the sum of $2,420.21, which is the admitted amount due if plaintiffs are right in their contention. Defendant answered and admitted the sum of $1,479.21 to be due on the short rate basis. This money was paid into court for plaintiffs. The court below sustained the contention of the plaintiffs, and rendered judgment for the difference between the *pro rata* rate and the short rate, being $941. Defendant has appealed.

Appellant has offered several defenses. It claims that there was no express authority to cancel existing insurance, the written contract of agency being silent in that respect. If the case depended upon this and this alone, it would be doubtful whether the act of respondents could be sustained. Authority to cancel a policy does not necessarily follow from authority to procure it. 3 Cooley, Briefs on The Law of Insurance, p. 2818; 19 Cyc. 648, and cases cited.

But, waiving this consideration, we are convinced that the letter and the pleadings offered on behalf of appellant are a ratification of respondents' act. This is not a case where the rights and liabilities of the two contracting parties, the

assured and the insurer, are involved. It is merely a question of agency. The fact remains that the policies have been canceled and the relations of the parties to the policies have been terminated. The only question remaining open, therefore, is whether respondents rightfully paid a *pro rata* amount on each policy or should have paid the short rate. Having ratified the cancellation and the return of premiums to the extent of the short rate, appellant cannot now maintain that respondents paid more than they should have paid. When a policy holder cancels a policy, he may be charged a short rate if it be within the terms of the contract. This right is sustained upon the theory that it is in the nature of a penalty as for a breach of contract. It is within the contract of the parties. When the company cancels, however, we know of no rule of law that would permit it to retain anything in the way of a penalty, or more than the *pro rata* earning of the policy. It cannot pay less than the policy holder is entitled to receive.

"It is also a general rule that on the cancellation of the policy the insured is entitled to the unearned premium." 2 Cooley, Briefs on The Law of Insurance, p. 1047.

See, also, May, Insurance (4th ed.), 67J; *Lattan v. Royal Ins. Co.*, 45 N. J. L. 453.

The policies issued by appellant are not before the court. We think we may judicially notice that the policies do not provide that an insured party would be subject to pay more than a ratable proportion of his premium, when the contract is terminated by the other party; for while parties might so contract, in the absence of a positive showing, we will not presume that the policy holder would contract to his disadvantage. There are other matters suggested in the briefs and arguments of counsel, but as we view this case, they have no bearing upon it.

The judgment of the lower court is affirmed.

MOUNT, C. J., GOSE, CROW, and PARKER, JJ., concur.

[No. 10538. Department One. December 12, 1912.]

A. P. HOCKERSMITH *et al.*, *Appellants*, v. TIMOTHY D. SULLIVAN *et al.*, *Respondents*.[1]

PLEADING—COMPLAINT—SEPARATE STATEMENT OF CAUSES. Under Ballinger's Code, § 4942, requiring several causes of action to be separately stated, a complaint may be struck out where it pleads as one cause of action, a wrongful eviction from a leasehold, damages by reason of a leaky roof, and injury from change of a street grade.

LANDLORD AND TENANT—QUIET ENJOYMENT—ACTS OF WRONGDOERS. Inasmuch as a lease granting quiet enjoyment does not insure against third parties who are wrongdoers, the landlord is not liable for damages to the leasehold by reason of work done by a city in grading a street.

SAME—SUBLEASE—ASSIGNMENT—ACQUISITION BY LANDLORD—LIABILITY FOR RENT. Upon a subletting for the full term, which is an assignment *pro tanto*, the landlord may acquire the interests of the subtenant without incurring any liability except for unpaid rent.

SAME—RELATION—TENANCY FROM MONTH TO MONTH. An unacknowledged lease for more than one year creates a tenancy from month to month only.

SAME—EVICTION—INTERFERENCE WITH ENJOYMENT. A tenant in possession who pays rent cannot claim that the landlord's interference with his enjoyment during occupancy amounts to an eviction.

SAME—REPAIRS—LIABILITY. Where the tenant assumes the obligation to repair the building, he cannot recover damages by reason of a leaky roof.

Appeal from a judgment of the superior court for King county, Myers, J., entered April 25, 1912, in favor of the defendant by direction of the court, in an action for damages. Affirmed.

John E. Humphries and *G. W. Sampson*, for appellants.

Miller & Lysons, for respondents.

[1]Reported in 128 Pac. 222.

Mount, C. J.—This action was brought to recover alleged damages for wrongful eviction from leased premises, and for damages to goods by reason of the leaking of the roof upon the leased building, and also for damages caused to the plaintiffs' business by the grading of the street in front of the premises. The complaint charged these different items of damages as one cause of action. The defendants moved the court to strike the complaint, because it contained more than one cause of action, which causes were not separately stated. This motion was sustained. The plaintiffs thereupon filed an amended complaint, setting out three causes of action. For the first cause, the complaint, after alleging the leasehold interest of the plaintiffs, recited, in substance, that in November, 1906, while plaintiffs were in the possession of the premises, the city of Seattle, by ordinance, provided for grading and cutting down Madison street in front of the premises, and thereafter contracted with one C. J. Erickson to perform the work, which was done by removing the earth and lowering the level of the street about eighteen feet below the entrance of the premises, thus rendering the premises inaccessible and of no value, and compelling the plaintiffs to remove from the premises for the period of three months, to their damage, in the loss of rental and business, in the sum of $700 per month.

For a second cause, the complaint alleged the leasehold interest of the prior owners, and that thereafter in April, 1906, when defendants became the owners of the property subject to the lease of plaintiffs, defendants, by a course of conduct which was intended to, and did, interrupt the said tenancy and rendered the leasehold of no value, caused the surrounding buildings to be torn down and moved away, blocked the sidewalk, street, and alley adjacent to the plaintiffs' storeroom, and caused water from the roof to leak upon and damage plaintiffs' goods in the sum of $1,000; loss of rentals in the sum of $1,500, and damages to fixtures in the sum of $600.

For a third cause of action, the plaintiffs alleged that they had leased a part of the premises to one Charles E. Boyer, who was, on July 1, 1907, prevailed upon to assign and transfer all his rights to the defendants, and refused to make any allowance for rent to the plaintiffs. Defendants demurred to each of these causes of action upon the ground, that there was a defect of parties; that it did not state facts sufficient to constitute a cause of action; and that the action was not commenced within time. These demurrers were sustained as to the first and third causes of action, and denied as to the second. An amended complaint was then filed, which set out the second cause of action substantially as above stated. The defendants answered by general denial, and affirmatively that the controversy had been settled, and that the judgment in the former action of *Hockersmith v. Ferguson*, 51 Wash. 256, 98 Pac. 670, was an adjudication of the matters set out in the complaint. After reply, the cause was tried to the court and a jury. At the conclusion of the case, the trial court directed a verdict for the defendants. Plaintiffs have appealed and argue, (1) that the court erred in striking the first complaint.

There was no error in this ruling. In *Hockersmith v. Ferguson*, 51 Wash. 256, 98 Pac. 670, which was a case involving this same lease and the same alleged damages, we said:

"Our statute, Bal. Code, § 4942 (P. C. § 412), provides that several causes of action may be united in the same complaint, but they 'must be separately stated.' The motions of the respondents asked that the statute be observed in this respect. The respondents were entitled to have these separate statements so that they could severally demur or answer to them in an orderly way, and frame the issues in a clear and definite manner. The court could not do otherwise than grant the motions, ..."

The original complaint in this case was substantially the same as in the one then under consideration in that case.

The motion to strike was properly granted under the rule of that case.

It is next argued that the court erred in sustaining the defendants' demurrer to the first and third causes of action stated in the amended complaint. The first cause of action alleges that the city ordered the street graded in front of the leased premises, and employed a man to do that work. It is not alleged that the landlord had anything to do with this work; it was done by the city or by its authority. The landlord was powerless to prevent the work, even if he desired to do so. No claim is made that the leased premises were taken by the city or by any one, but simply that the street was cut down so that the premises were rendered useless. If this work of the city or its employees was wrongful and resulted in the property becoming useless to the plaintiffs, the lessors, or the defendants in this case, were not liable for such wrongdoing. *Schilling v. Holmes*, 23 Cal. 227; *Branger v. Manciet*, 30 Cal. 625. A lease granting to the tenant quiet enjoyment does not insure against third parties who are wrongdoers.

The third cause of action alleged that on December 9, 1905, plaintiffs sublet one of the stores on the property to one Charles E. Boyer, for the full term of their own lease; that on July 1, 1907, defendants, by inducement and intrigue, prevailed upon said Boyer to assign all his interest in the said premises to the defendants, who were then owners in fee; that defendants refused to pay rent to the plaintiffs. Assuming that the leasehold from the plaintiffs was a valid lease for the term named therein, the lease from plaintiffs to Boyer was a lease for the full term, and therefore operated as an assignment *pro tanto*. *Weander v. Claussen Brewing Ass'n*, 42 Wash. 226, 84 Pac. 735, 114 Am. St. 110. Defendants, being the owners in fee, therefore had a right to acquire the interest of Boyer in the property. The only right plaintiffs would have against the defendants would be an action for debt on account of rent unpaid. Such

action was void by lapse of time. The court, therefore, properly sustained the demurrer to these two causes of action.

The cause was tried to the jury upon the second cause of action, as above stated. At the close of the evidence, the court directed a verdict for the defendants. Plaintiffs contend that this was error. It appears that, in 1905, the property was owned by the Cyrus F. Clapp Estate Company. On April 1, 1905, that company leased the premises to R. J. Ferguson and wife for a period of five years from that date. In December, 1905, Mr. Ferguson agreed to lease the premises to the plaintiffs for a period of two years from January 1, 1906. Plaintiffs went into possession, and a written lease was prepared and signed by the parties, which was not acknowledged by Ferguson. The premises at that time contained two store buildings, Nos. 215 and 217 Madison street. On the same day the plaintiffs took possession, they sublet the store, No. 217, to C. E. Boyer for the full term of two years. On April 2, 1906, the defendants purchased the property from the Clapp Estate Company. At that time the lease from Ferguson to the plaintiffs was of record, but was not acknowledged by Ferguson. The plaintiffs continued in possession of the building at 215 Madison street until September 16, 1907, when they vacated the premises. They had paid rent up to August 31 preceding. Thereafter, in October, 1907, the plaintiffs brought an action against these defendants and a number of other defendants, setting forth the same claims for damages which are made in this action. That action was dismissed, and the dismissal was affirmed by this court. *Hockersmith v. Ferguson*, 63 Wash. 581, 116 Pac. 11.

Thereafter, in July, 1911, this action was brought against the defendants, who had purchased the property while plaintiffs were in possession of the store building, 215 Madison street. It is apparent that the court properly directed a verdict, because the lease from Ferguson was an unacknowl-

edged lease for more than one year. The plaintiffs, therefore, were tenants from month to month. *Brownfield v. Holland*, 63 Wash. 86, 114 Pac. 890.

"Where a tenant remains in possession of premises and pays rent therefor, he cannot claim that acts of the landlord interfering with his enjoyment of the premises during his occupancy thereof amount to an eviction." *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760.

In *Hockersmith v. Ferguson*, 63 Wash. 581, 116 Pac. 11, in considering the same lease and tenancy, we held that it was the duty of the plaintiff in this action to repair the building. Inasmuch as the principal damages complained of were caused by the roof leaking, it is apparent that the defendants were not liable for damages caused thereby. The evidence fails to show any eviction by the defendants, or any damages for which the defendants are liable. We are also of the opinion that the other action brought against these same defendants was *res adjudicata* of all claims made in this case. But in view of our conclusion upon the merits, it is needless to consider that question.

The judgment is therefore affirmed.

PARKER, CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10656. Department Two. December 12, 1912.]

Frank Hillebrant, *Appellant*, v. Frank Manz, *Respondent*.[1]

Municipal Corporations—Use of Streets—Violation of Law—Negligence. It is actionable negligence to drive an automobile on a city street at a rate of speed exceeding the speed limit and approach a pedestrian near an intersecting street without sounding an alarm, in violation of positive law.

Same—Contributory Negligence—Question for Jury. A pedestrian struck by an automobile when about to board a street car waiting near a street intersection, is not guilty of contributory negligence, as a matter of law, where, before starting for the car, he looked back and saw no automobile in the street, and walked toward the street car without again turning to look back, in the absence of any sound of a horn or other warning; other witnesses also testifying that the street was clear when he started for the car.

Same—Proximate Cause—Contributory Negligence—Last Clear Chance. Failure to look back after leaving the curb, even if contributory negligence, does not preclude a recovery where the defendant, driving an automobile, could have seen the plaintiff and avoided the accident if he had been running at a reasonable rate of speed or sounded a horn.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 2, 1912, upon granting a nonsuit, dismissing an action for personal injuries sustained in a collision with an automobile. Reversed.

R. W. McClelland, for appellant.

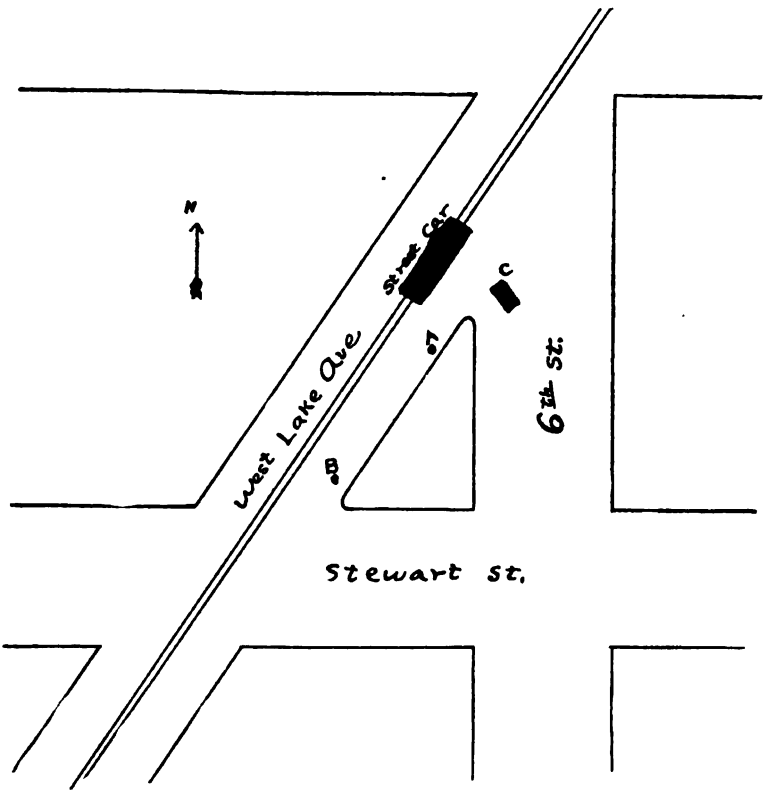
John W. Roberts, for respondent.

Ellis, J.—This is an action to recover damages for personal injuries, suffered by the plaintiff by being struck by the defendant with his automobile.

The negligence charged was, that the defendant negligently ran his automobile at a rapid, dangerous, and unlawful rate of speed; that the automobile was without good and proper brakes, steering gear, and horn, and that the defend-

[1]Reported in 128 Pac. 892.

ant negligently and carelessly, without sounding any horn or giving any other alarm, ran his automobile upon the defendant, inflicting the injuries complained of. The accident occurred in the city of Seattle, upon Westlake avenue near its intersection with Sixth street. In order to a proper understanding of the locality, we reproduce a plat with reference to which the witnesses testified and which is admitted by both sides as approximately correct.



The plaintiff testified that, at about two o'clock in the afternoon of September 8, 1911, he was standing on the curb of the sidewalk on the easterly side of Westlake avenue, at a point about twelve feet southerly from the northerly

rounded point of the triangular block bounded by Westlake avenue, Stewart street and Sixth street. He stood near a guy post supporting the suspension wire for the trolley cable of the electric street car line which occupies the middle of Westlake avenue. He had some bundles in his arms, and was waiting to take a north-bound car for his home in Ballard. This post bore the sign "Cars stop here," and marked the usual place of stopping to take on passengers when any were waiting there. He located this post at the point which we have designated with the letter A upon the plat. The distance in a straight line from the curb to the nearest rail of the car track is about twenty-one feet. When his car arrived from the south, it passed the post a short distance before slowing up and stopping at a point about opposite to or a little beyond the rounded apex of the triangle as shown upon the plat. Just as the car was stopping, he looked south on Westlake avenue and saw no automobile or other vehicle. The street was perfectly clear. He stepped into the street and started in a diagonal direction toward the car without looking back, which is the last thing he remembers. In taking his course from the guy post toward the car, his back was necessarily turned to the south. He heard no gong, horn, or sound from the automobile, nor did he receive any other warning of its approach.

The conductor of the street car testified that he was standing in the rear vestibule of his car when it approached a point opposite the post marked "Cars stop here;" that he saw the plaintiff standing on the curb near the post with some bundles in his arms; that he gave the usual signal of two bells to stop the car; that the car ran a short distance past the post, stopping at a point about as indicated upon the plat; that he saw the plaintiff start diagonally across the intervening space toward the car without turning or looking back; that the witness looked south along Westlake avenue and saw the defendant in his automobile approaching from the south at a very rapid rate; that when he first saw

the automobile it was a short distance north of the intersection of Stewart street and Westlake avenue, on the east side of the avenue, at a point which he indicated upon the plat and which we have designated by the letter B; that this point was about 75 or 80 feet from the place where the plaintiff was struck; that the automobile was running twenty-five or thirty miles an hour; that no horn was sounded or other warning given; that the plaintiff's back was toward the automobile; that as the automobile approached, it swerved slightly toward the curb; that the plaintiff had taken only two or three steps when the automobile struck him on the right side and back, carrying him or throwing him fifteen or twenty feet and knocking him senseless; that the automobile even then retained such speed that it skidded on into Sixth street, sliding and swinging around, finally stopping in Sixth street with the rear toward the street car; that the pavement was wet. This witness located the automobile when it finally came to a stop as we have indicated by the letter C upon the plat. He testified that the defendant apparently threw on the brakes so that the rear wheels of the automobile slid along the pavement, as shown by the marks of the wheels, for a distance of sixty feet or more before the plaintiff was struck.

Two other eyewitnesses of the accident, one of whom viewed it from the rear of the street car and the other from the sidewalk, testified to practically the same facts as did the conductor. All agreed that the automobile was running at least twenty-five miles an hour, and was still going very rapidly when it struck the plaintiff. All agreed that the defendant sounded no horn or gave other warning of his approach. This fact was also testified to by a woman who was on the rear of the street car waiting to get off. None of these witnesses testified to seeing the automobile until after it was a little distance north of Stewart street, at or near the point marked B upon the plat. None of the witnesses saw the plaintiff look south before starting for the street car.

The evidence on this point rests upon his own testimony, that he looked in that direction just before leaving the curb and saw no automobile. It seems to be admitted that Westlake avenue at the place in question was paved, and has a slight but uniform down grade toward the north, and that the pavement was wet.

An experienced chauffeur, called as an expert, testified that he had driven automobiles of various kinds, including the kind here involved; that he had experimented as to the distance within which an automobile could be stopped; that he was acquainted with Westlake avenue at the point here in question; that an automobile running at the rate of twenty-five miles an hour upon a wet pavement, slightly down grade, would run about one hundred feet after the brakes were applied before stopping. The evidence showed that it was about one hundred feet from the point where the automobile was first observed by any witness to the point where it finally came to a stop. The plaintiff also introduced in evidence Ordinance No. 24,597 of the city of Seattle. In section 13 is found the following:

"No person shall ride, drive or propel any automobile, autocycle, or other motor vehicle, without having attached thereto a bell, gong, or whistle, in good working order, and sufficient to give warning of the approach of said vehicle or machine, nor shall the driver thereof fail or neglect to sound such device as a warning upon approaching any other vehicle or pedestrian; or upon approaching any place where a person, or persons may be entering or leaving any street car, or other public conveyance, or upon approaching any street intersection, or before passing around a corner . . . ."

Section 17, as applied to the district here in question, prescribes a maximum lawful rate of speed of twelve miles an hour on paved streets. Section 30 is as follows:

"No person shall carelessly, heedlessly or negligently ride or drive any horse or other animal, or ride, or propel any automobile, or motor vehicle in, through, along, or over any public place so that such animal, or vehicle attached thereto,

or any such automobile, or auto vehicle, shall come in collision with any other animal or vehicle, or shall strike against any person."

From an order of nonsuit and a judgment dismissing the action, the plaintiff has appealed.

If the evidence introduced in behalf of the appellant was true, and it must be so assumed in passing upon the motion for nonsuit, the respondent was guilty of negligence in at least two of the particulars charged. He was running his automobile at about twice the maximum lawful rate of speed (Ordinance No. 24,579; Rem. & Bal. Code, § 5571). He sounded no horn or other alarm in approaching a pedestrian within twelve feet of an intersecting street, and who, as must have been manifest to any observer, was intending to board the street car at a usual stopping place. In both of these particulars he was acting in violation of positive law. This was in itself negligence. *Ballard v. Collins*, 63 Wash. 493, 115 Pac. 1050; *Engelker v. Seattle Elec. Co.*, 50 Wash. 196, 96 Pac. 1037; *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284. Even in the absence of the violation of any speed limit as fixed by statute or ordinance, the question of respondent's negligence would still be one of reasonable care. It would still be for the jury to say whether he was guilty of a lack of such care in driving his automobile at the rate of twenty-five miles an hour upon the wet pavement of a city street, past a stopping street car, and within twenty feet of an intersecting street where pedestrians were likely to be encountered in getting on or off the car. It has been so held where an automobile was running at the time at the rate of only six or seven miles an hour. *Brewster v. Barker*, 129 App. Div. 724, 113 N. Y. Supp. 1026; *Thies v. Thomas*, 77 N. Y. Supp. 276; *Marsh v. Boyden*, 33 R. I. 519, 82 Atl. 393; Huddy, Automobiles, p. 142; Berry, Law of Automobiles, § 164. In any view of the case, the question of respondent's negligence was, under the evidence, one for the jury.

The trial court held that, even conceding that the respondent was guilty of negligence, the appellant was, as a matter of law, guilty of such contributory negligence as to preclude a recovery. This was error. In common with other courts, we have held that, in passing upon a motion for a nonsuit, the court must consider, not alone the literal statements of the witnesses, but every justifiable inference favorable to the party against whom the motion is directed. *Young v. Aloha Lumber Co.*, 63 Wash. 600, 116 Pac. 4; *Ladouceur v. Northern Pac. R. Co.*, 4 Wash. 38, 29 Pac. 942; *Hendrickson v. Simpson Logging Co.*, 69 Wash. 72, 124 Pac. 395.

The appellant testified that, just before stepping from the curb, he looked south along the avenue and saw no automobile. The inference thus raised, that the automobile was not then there, is not overcome by the fact that three other witnesses an instant later saw the automobile at a point on the avenue immediately north of its intersection with Stewart street. On the contrary, the coincidence, that no witness saw the automobile at any point on the avenue south of Stewart street, was a fact from which the jury would have the right to infer that it at that instant swung into the avenue from Stewart street. This inference would be justified by the speed of the automobile, which need not be diminished by the wide curve which it could describe in swinging in on Stewart street from the west, and by the appellant's statement that he looked before leaving the curb and saw no automobile. This inference harmonizes the testimony of all of the witnesses, and runs counter to no other fact in evidence. *Marsh v. Boyden*, *supra*.

Whether, after looking once and seeing a clear street, the appellant acted as a reasonably prudent man in proceeding from a point within twelve feet of the street intersection toward the street car which he was intent upon boarding, without again turning and looking south along the avenue, in the absence of any sound of horn or other warning,

was plainly a question for the jury. As said by the supreme court of Massachusetts, so holding in a case parallel with this in every essential particular:

"There is no imperative rule of law which has been called to our attention generally requiring a pedestrian when lawfully using the public ways to be continuously looking or listening to ascertain if autocars are approaching, under the penalty that upon failing to do so, if he is injured, his negligence must be conclusively presumed." *Hennessey v. Taylor*, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345.

See, also, *Baker v. Close*, 204 N. Y. 92, 97 N. E. 501, 38 L. R. A. (N. S.) 487; *Dugan v. Lyon*, 41 Pa. Sup. Ct. 52; *Bouma v. Dubois*, 169 Mich. 422, 135 N. W. 322; *Diamond v. Cowles*, 174 Fed. 571; *Purtell v. Jordan*, 156 Mass. 573, 31 N. E. 652; *Lynch v. Fisk Rubber Co.*, 209 Mass. 16, 95 N. E. 400; *Richmond v. Tacoma R. & P. Co.*, 67 Wash. 444, 122 Pac. 351; *Morris v. Seattle, R. & S. R. Co.*, 66 Wash. 691, 120 Pac. 534.

We have so often held that a court will not be justified in taking from the jury the question of contributory negligence, unless the acts done are so palpably negligent as to preclude the possibility of difference of opinion concerning them, that citation of authority to the point seems unnecessary. Even granting that the appellant was negligent in failing to look to the south after leaving the curb, that fact cannot be held, as a matter of law, the proximate or efficient cause of the injury. The respondent had no absolute right of way upon the street. His right was certainly no greater than that of the appellant. Their rights and duties were reciprocal. Whether, notwithstanding any previous negligence of the appellant, the respondent could have seen the appellant and avoided the accident had he been running at a reasonable rate of speed or had he sounded a horn, was a question for the jury. Davids, The Law of Motor Vehicles, § 118; *Burvant v. Wolfe*, 126 La. 787, 52 South. 1025, 29

L. R. A. (N. S.) 677; *Morris v. Seattle, R. & S. R. Co., supra; Mallett v. Seattle, R. & S. R. Co.*, 66 Wash. 251, 119 Pac. 748.

We cannot, without unwarrantably extending this opinion, review the many authorities cited by the respondent. They are all of them distinguishable from this case upon the facts.

The judgment is reversed, and the cause is remanded for further proceeding.

MOUNT, C. J., MORRIS, FULLERTON, and CHADWICK, JJ., concur.

[No. 10657. Department One. December 12, 1912.]

RUFUS P. MOONEY, *Respondent*, v. MOONEY COMPANY, *Appellant*.[1]

EVIDENCE—PAROL EVIDENCE TO VARY WRITING. Upon a sale of a stock of goods to a corporation, pursuant to a written offer and an acceptance in writing, by the specific terms of which the vendee was to pay for the goods by issuing its capital stock for $33,000, it is inadmissible to show by oral evidence that the vendee assumed an indebtedness of the vendor on a note given for money loaned and used in the business.

FRAUDULENT CONVEYANCES—SALES IN BULK—VERIFIED STATEMENT OF CREDITORS—BURDEN OF PROOF. In an action against a buyer of a stock of goods in bulk, to recover upon an express contract to assume a promissory note of the vendor, the plaintiff need not prove affirmatively compliance with the sales in bulk law requiring a verified statement of the names and addresses of the creditors of the vendor; and there is no presumption that the law was not complied with.

CORPORATIONS—REPRESENTATIONS—OFFICERS ADVERSELY INTERESTED—ULTRA VIRES ACTS—ESTOPPEL. A corporation is not estopped to question the legality of a transaction whereby one of its officers gave the note of the corporation in renewal of his personal note, as the transaction was presumptively *ultra vires*, and one dealing with such officer is presumed to know that he cannot bind the company in matters in which he is adversely interested; especially where the company derived no benefit from the transaction.

[1]Reported in 128 Pac. 225.

SAME—ACTS OF OFFICERS—RATIFICATION—REQUISITES. In such case, there can be no ratification by the corporation through acts of the officer implicated, where a trustee whose authority was a necessary prerequisite had no notice of the acts.

Appeal from a judgment of the superior court for King county, John S. Jurey, Esq., judge *pro tempore*, entered April 19, 1912, upon findings in favor of the plaintiff, in an action on contract, after a trial to the court. Reversed.

Roney & Loveless, for appellant.

Henry S. Noon, for respondent.

GOSE, J.—This is a suit upon two promissory notes. The defendant has appealed from an adverse judgment. The facts are these: Prior to the 5th day of February, 1908, one O. P. Mooney owned and personally conducted a stationery store, in the city of Seattle. On the 30th day of September, 1907, he hired from the respondent, a brother, the sum of $2,000, and gave him his interest-bearing note therefor, payable six months after date. The money was deposited in the bank to the credit of O. P. Mooney, and used generally in the business. On the date first mentioned, O. P. Mooney, his wife, Katy A. Mooney, and William A. Wood, organized the appellant corporation. On the same day, O. P. Mooney made the following offer to appellant:

"O. P. Mooney offers to sell to O. P. Mooney Company the good will and stock and business and all sums of money due him for $33,000, and to take paid-up capital stock for that amount, and he directs that 166 shares be issued to himself, 162 shares to be issued to Kate A. Mooney, and two shares to Wm. A. Wood. O. P. Mooney."

Its acceptance was as follows.

"Whereas O. P. Mooney offers to sell to O. P. Mooney Company the good will and stock and business and all sums of money due him for $33,000, and take paid-up capital stock for that amount, Now, therefore, be it resolved that the O. P. Mooney Company accepts said offer of O. P. Mooney, and the president and secretary are directed to issue

to O. P. Mooney 166 shares, 162 shares to be issued to Katy A. Mooney, and two shares issued to William A. Wood in full payment of the respective subscriptions to the capital stock. Wm. A. Wood, Secretary."

O. P. Mooney then made the transfer in harmony with the offer and acceptance. Thereupon the appellant issued its capital stock as agreed upon. The business was thereafter carried on by the appellant. The three stockholders were elected trustees, and the trustees elected O. P. Mooney as president and manager, Katy A. Mooney as vice president, and William A. Wood as secretary. O. P. Mooney and Katy A. Mooney continued to hold their respective offices in the corporation until the 26th day of November, 1910, when they resigned and were succeeded by new trustees and officers. William A. Wood continued as secretary and bookkeeper until November 1, 1908, when he was succeeded by Frederick W. Hill, who served in that capacity until the 26th day of November, 1910, when he resigned and a successor was elected. Hill acted in the double capacity of bookkeeper and general manager from the first day of March, 1911, until the 27th day of August, following, when the appellant's assets appear to have been sold to a third party.

On the 29th day of March, 1908, O. P. Mooney gave his personal note to the respondent, payable in sixty days, for the $2,000 which he had hired, and the first note was surrendered. Between that date and July 11, the appellant paid to the respondent $400 on the last named note; and on that date gave him three notes, two of which were for $500 each, due in three and six months respectively, and the third was for $600 due in nine months, and the respondent surrendered the second Mooney note. The appellant's notes were signed, "O. P. Mooney Co., by O. P. Mooney, President." There was no consideration for these notes other than the surrender of the Mooney note. The appellant paid the $500 note first maturing. All of the appellant's books showed the appellant

as the maker of these notes and the amount of each thereof. The notes were thereafter shown as a liability against appellant in all of its financial statements to the bank with which it did business, and to the commercial agencies. Interest payments were made from time to time by the appellant, acting through its president and secretary. The last payment was made by Manager Hill, April 11, 1911, after the election of the new officers. There is no evidence that the new trustees knew of the payment at the time it was made, or that Katy A. Mooney knew of the notes until a short time before the commencement of the suit. Manager Hill says that he sent to the new trustees three statements of the resources and liabilities of the appellant. The first one bears date January 14, 1911, and shows "Bills payable, R. P. Mooney, $1,100." The other two statements bear date respectively March 1, 1911, and May 1, 1911. The former shows bills payable $1,100, and the latter shows the same item, $1,182.87, without disclosing the name of the creditor. O. P. Mooney had the entire management of appellant's business from the date of its incorporation until he resigned in November, 1910. He and Katy A. Mooney separated on February 5, 1908, and were divorced on April 13 following. O. P. Mooney filed a voluntary petition in bankruptcy in September, 1910, and deceased before the trial of this action.

The court found: (1) that the appellant assumed the indebtedness of O. P. Mooney; (2) that the notes were given "with the sufferance and acquiescence" of Katy A. Mooney; (3) that the sale by O. P. Mooney to the appellant was a sale in bulk, and that the statutory affidavit was "neither asked nor demanded;" and (4) that the appellant is estopped to dispute the validity of the notes. In pursuance of these findings, a judgment was entered against the appellant for the full amount of the principal of the two notes, the unpaid interest, attorney's fees and costs.

The first finding, i. e., that the appellant assumed the indebtedness of O. P. Mooney, is contrary to the plain terms of the offer and acceptance. The entire transaction was in writing. Mooney offered to sell the good will, stock, and business, and all sums of money due him, for $33,000, and to take as a consideration paid up capital stock for that amount, and directed the issuance of 166 shares to himself, 162 shares to Katy A. Mooney, and two shares to William A. Wood. The offer was accepted, the property was conveyed, and the stock was issued as directed. This closed the transaction. The offer and acceptance constituted the contract, and they are plain, detailed, and specific, and no extrinsic aid is needed to interpret them. Parol evidence to establish the assumption of Mooney's indebtedness was therefore inadmissible.

We may say, however, in passing, that the parol evidence was not sufficient to prove the assumption of the indebtedness. Mrs. Mooney says that the subject was not discussed. In this she is supported by the admitted fact that Mooney once personally renewed the note after the appellant took over the property. It is true that Wood said that the appellant paid some of Mooney's indebtedness, the amount not being stated. But it is also true that Mooney owed more than $12,000 which it did not pay.

It is admitted that the trustee Wood knew of the execution of the notes and the payment of the interest. The evidence, however, does not show that the notes were given "with the sufferance and acquiescence" of Katy A. Mooney, the other trustee and stockholder, as found by the court. Her testimony is that she was ignorant of the transaction until after the last payment of interest had been made, and there is nothing in the record rising to the dignity of evidence to prove the contrary.

The record is silent on the third finding, i. e., that a verified statement of the names and addresses of the creditors of Mooney was not given. The finding must have been based

upon the legal presumption that it devolved upon the appellant to prove affirmatively that the statute was complied with. No such duty rested upon it, for two reasons: (1) The action is not grounded on fraud or the failure of the appellant to require the statutory affidavit, but it is grounded upon an alleged express contract for the payment of money to the respondent; and (2) there is no legal presumption that the requirements of the statute were not fulfilled. 16 Cyc. 1082; *Sheffield v. Balmer*, 52 Mo. 474, 14 Am. Rep. 430.

There remains for discussion the contention that respondent chiefly relies upon, that the appellant is estopped by its conduct to question the legality of the transaction. The facts have been stated and need not be repeated. The respondent will be presumed to know that an officer in a corporation, however extensive his apparent authority may be, may not bind his principal in a matter in which he is adversely interested. Mooney could not at the same time act for himself and for his principal, without the full knowledge and free consent of the principal. *O'Conner Min. etc. Co. v. Coosa Furnace Co.*, 95 Ala. 614, 10 South. 290, 36 Am. St. 251; *Gallery v. National Ex. Bank*, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149. An officer who receives the note or other obligation of a corporation in payment of the personal debt of the officer with whom he deals does so at his peril. The reason is that such a transaction is not in the regular course, but is presumptively *ultra vires*. *Merchants' Nat. Bank v. Detroit Knitting etc. Works*, 68 Mich. 620, 36 N. W. 696; *Wilson v. Metropolitan Elev. R. Co.*, 120 N. Y. 145, 24 N. E. 384, 17 Am. St. 625; *Farrington v. South Boston R. Co.*, 150 Mass. 406, 23 N. E. 109, 15 Am. St. 222, 5 L. R. A. 849; *Porter v. Winona & D. Grain Co.*, 78 Minn. 210, 80 N. W. 965; *Pelton v. Spider Sawmill & Lumber Co.*, 132 Wis. 219, 112 N. W. 29, 122 Am. St. 963; *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557.

In the *Wilson* case, Judge Parker, who wrote the opinion of the court, said:

"Undoubtedly the general rule is that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of such officer, does so at his own peril. *Prima facie* the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation. (*Garrard v. P. & C. R. R. Co.*, 29 Penn. St. 154; *Pendleton v. Fay*, 2 Paige, 202; *Shaw v. Spencer*, 100 Mass. 388.)"

In the *Farrington* case, the rule is thus stated:

"An agent cannot properly act for his principal and himself when their interests are adverse, and any person dealing with an agent in a matter affecting his principal, and knowing that the interests of the agent are adverse to those of his principal, ought to be held to the duty of ascertaining that the acts of the agent are authorized by his principal."

The basis of all estoppel is that the party invoking the doctrine has acquired rights in innocent reliance upon acts of the other. Without one innocent party and one negligent party there can be no occasion for the application of the doctrine. *Germania Safety-Vault & Trust Co. v. Boynton*, 71 Fed. 797; *Wheeler v. Home Sav. & State Bank*, 188 Ill. 34, 58 N. E. 598, 80 Am. St. 161; *Whitfield v. Nonpariel Consol. Copper Co.*, 67 Wash. 286, 123 Pac. 1078; 11 Am. & Eng. Ency. Law (2d ed.), 439.

In the *Boynton* case, the court, speaking through Judge Lurton, said:

"The corporation had no power to lend its credit to Herman and Pank. Its obligations entered into for that purpose would be void in the hands of one who took them with notice. The consent of the stockholders would not strengthen the case. A defect in the power of the corporation is not supplied by the agreement of the corporators."

The rule is thus tersely stated in the *Wheeler* case:

"No fruits of the transaction were received by the company, and its mere acquiescence in the unauthorized acts of

its officers in a matter outside of its corporate powers cannot give rise to an estoppel."

In the *Whitfield* case, the president of the defendant corporation was indebted to the plaintiff and had pledged certain collateral as security for the debt. The plaintiff thereafter exchanged the collateral for a fraudulent certificate of stock, purporting to have been regularly issued by his debtor as president of the corporation, to a third party who had indorsed it in blank. This was sought to be made the basis of an estoppel against the defendant, the principal of the offending officer. In meeting that situation the court said:

"Reference to these authorities will show that it is well settled that one who deals with an apparent agent with reference to his private affairs cannot hold a company to an estoppel, but must look to one who has wronged him; for his debt is not thereby discharged, but continues."

McLellan v. Detroit File Works, 56 Mich. 579, 23 N. W. 321, is an instructive case involving facts substantially identical with the facts at bar. The opinion was written by Judge Cooley. There two persons, while carrying on a partnership business, gave the plaintiff two firm notes. Later the partners formed a corporation, taking all the shares of stock except two, and the partnership assets were transferred to the corporation in consideration of the stock issued to the partners. One of the partners who was made president of the corporation assumed to renew the notes three or four times as notes of the corporation, making small payments at each renewal with checks or other paper of the corporation. The avails of the original notes were transferred with the other partnership assets to the corporation. But the evidence showed that the other stockholders were not aware that the president was giving corporate obligations in place of the obligations of the firm. It was held, that the plaintiffs were deemed to have accepted renewals of the notes with knowledge of all the facts; that

they were deemed to have known that an officer of a corporation could have no general authority to give the notes of a corporation to take up the outstanding obligation of its members, and that persons taking such notes from him must at their peril ascertain that the special authority had been conferred. In commenting upon the significance of the transfer of the assets of the partnership to the corporation, the court said:

"The fact that the assets of the partnership went to the corporation has no significance in this controversy. The partners were paid for their interest in the assets with stock of the corporation, and the creditors of the partnership lost nothing by it, for the partners continued liable to them, as before, and with, presumptively, as much property as before. That Hayes used checks of the corporation to pay firm debts has, if possible, still less significance. . . . . The fact that nearly all the shares in the corporation were issued to Rowe & Hayes is mentioned in the argument as tending to the proof of an understanding that the corporation would assume partnership debts. But it was an immaterial fact. The corporation when formed, was not identical with the partnership of Rowe & Hayes, and could not be sued for their debts even if there were no other stockholders."

See, also, *Durlacher v. Frazer*, 8 Wyo. 58, 55 Pac. 306, 80 Am. St. 918.

There is a suggestion in the brief of the respondent that the appellant ratified the unlawful acts of its president. This position is not sound. The appellant never acted on the matter at all. Corporations are managed through boards of trustees. One of the trustees was not aware of the existence of the notes until after the last interest payment had been made. The president and secretary were powerless to ratify their own wrongful acts. The same authority is required to ratify a contract as to make it in the first instance. *Porter v. Winona & D. Grain Co., supra; Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.*, 63 Vt. 581, 22 Atl. 575, 25 Am. St. 783.

The respondent's authorities go no further than to hold that, where a corporation has received a benefit through a transaction of its managing officer in the regular course of business with an innocent party, the corporation will be held estopped to claim that the officer exceeded his authority. This rule does not aid the respondent. The appellant received no benefit from the transaction and the respondent was not innocent.

The judgment is reversed, with directions to enter a judgment for the appellant.

MOUNT, C. J., CROW, CHADWICK, and PARKER, JJ., concur.

[No. 10528. Department One. December 12, 1912.]

GEORGE FRANCIS ROWE *et al.*, *Appellants*, v. R. E. JAMES *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS — STREETS — VACATION — STATUTES — IMPLIED REPEAL. The act of 1901, Rem. & Bal. Code, §§ 7840-7843, providing a complete method for the vacation of streets and alleys in some respects inconsistent with the earlier law, repeals by implication Id., § 7847, of the earlier act.

SAME—OWNERSHIP ON VACATION—STATUTES. The act of 1901, Rem. & Bal. Code, § 7842, providing that, upon the vacation of a street, the fee should belong to the abutting owners, confers no rights where vested rights were acquired prior to the passage of the act, in view of § 4 of the act, Rem. & Bal. Code, § 7843, providing that no vested rights shall be affected by the act.

DEDICATION—STREETS—FEE. A city acquires only an easement in streets dedicated by a plat.

MUNICIPAL CORPORATIONS—STREETS—VACATION—OWNERSHIP OF FEE—DEDICATION—PLATS. The general rule that abutters own the fee to the center of the street is controlled by the circumstances; and where an owner plats land bounded by a street included in the plat and owns nothing beyond the street, his conveyance of land abutting on the street carries the fee to the entire street; and vacation vests title to the entire street in such owner.

[1]Reported in 128 Pac. 539.

SAME—STREETS—VACATION—RIGHTS. An abutting owner acquires no rights to the fee of a vacated street by reason of the payment of assessments for its maintenance and improvement.

TENANCY IN COMMON—ESTOPPEL. One cotenant cannot estop another by his unauthorized words and acts.

SAME. The fact that two cotenants circulated a petition for the vacation of a street with the knowledge and consent of another cotenant did not authorize them to surrender any of his rights in the property.

ESTOPPEL—REPRESENTATIONS AS TO MATTERS OF LAW—TITLE TO PROPERTY. Where abutters on one side of the street, owning the entire fee, induced abutters on the other side, whose signatures were necessary, to sign a petition for vacation of the street by falsely representing that upon vacation all the abutters would take the fee in equal shares, they are estopped to assert their title to the entire street, where the misrepresentations were made with knowledge of their falsity, and were relied upon.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 14, 1912, upon findings in favor of the defendants, in an action to quiet title. Modified.

John W. Roberts and *George L. Spirk*, for appellants.

Reed & Hardman, for respondents.

GOSE, J.—This is an action to quiet title to a strip of land thirty feet in width, extending from the south line of East Union street, in the city of Seattle, to the north line of East Madison street, and known as Old Eleventh avenue, and being one block in length. The decree awarded to the plaintiffs the westerly half of the strip of land, and awarded the remainder to the defendants. The plaintiffs have appealed, contending that they are the owners of the entire tract.

The facts which form the basis of the appellants' contention are these: In 1882 one George Werett, being the owner of a five-acre tract of land, platted it as Werett's addition to the city of Seattle. A street thirty feet in width was marked on the plat as the eastern boundary of the addition.

Lot 1, in block 2, of the addition lies parallel to, and abuts upon, this street on its westerly side, the full length of the street. A wedge-shaped tract of unplatted land, terminating at the point of junction of East Union and East Madison streets, also abuts upon the street on the east side thereof. Werett owned no property east of the street. On the 17th day of March, 1911, this street was vacated upon the petition of all the parties to the action, they being the only abutting owners. The appellants then were, and for several years had been, the owners of said lot 1, and the respondents then owned and still own the unplatted land. Pending the action, the appellants Jones and wife conveyed their interest in the property to the appellants Gidner and wife. The vacated street is the property in controversy.

The court found, that the appellants induced the respondents to unite in the petition for the vacation of the street by representing to them that, upon its vacation, the easterly one-half thereof would attach to and become a part of the respondents' property, and that the westerly one-half would attach to and become a part of the appellants' property; that the respondents, in reliance upon such representations, signed the petition; that the petition would have been insufficient without the signatures of the respondents; that the respondents have changed their position and surrendered valuable rights as owners of property abutting on the street, and that the appellants "ought not to be permitted to assert or claim" ownership of the easterly one-half of the tract. The court further found that the respondents had paid assessments on account of the establishment, maintenance, and improvement of the street prior to its vacation.

The respondents contend, (1) that they became the owners of the portion of the street awarded to them by operation of law when the street was vacated, and (2) that the appellants upon the facts found by the court are estopped to deny their title.

The first contention is based upon the assumption that the

old law, carried into the Code of 1881 as §§ 2333, 2334, 2335, and 2336, and carried into Rem. & Bal. Code as §§ 7844, 7845, 7846, and 7847, is still in force. The first three sections apply only to towns not incorporated; and § 2336, Rem. & Bal. Code, § 7847 was repealed by the Laws of 1901, page 175 *et seq.*, Rem. & Bal. Code, §§ 7840 to 7843 inclusive. These laws all relate to the vacation of streets and alleys. The law of 1901 respecting the vacation of streets and alleys in incorporated cities and towns is a complete act upon the subject and in some essential respects is inconsistent with the provisions of the old law. *Seattle v. Hinckley*, 67 Wash. 273, 121 Pac. 444.

They further contend that, under the Laws of 1901, Rem. & Bal. Code, § 7842, they became the owners of the easterly one-half of the tract when the street was vacated. This view is not sound, as § 4 of the Laws of 1901, Rem. & Bal. Code, § 7843, expressly provides that vested rights shall not be affected by the act. We have uniformly held that a city acquires only an easement in a street in consequence of a dedication. *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988; *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362; *In re Westlake Avenue*, 66 Wash. 277, 119 Pac. 798; *Norton v. Gross*, 52 Wash. 341, 100 Pac. 734.

In the *Gifford* case, we recognized the general rule that, in the absence of a governing statute or a reservation in the grant, the owner of the land on each side of the street owns the fee to the center of the street, subject only to the easement in the public. We held, however, that the general rule may be controlled by the peculiar circumstances of the case. In that case a street was laid by the dedicators along the boundary of their land. In view of that fact, we said:

"Having conveyed the upland to the street which marked the boundary of their land, the presumption is that the grantee was invested with the fee to the entire street, and we do not think that the surrounding circumstances overcome this presumption."

When the city has surrendered its easement by a vacation of the street, it has no further interest therein. The fee in the street remained in Werett after the dedication, and passed to the appellants as an incident to their acquisition of the fee in all the abutting property that Werett had owned. None of the respondents' grantors owned any part of the street. Their title reached only to its easterly line. As abutting owners, respondents had the easements of access, light, and air, but the vacation of the street upon their petition extinguished these rights and, as their predecessors in title had never owned any part of the street, they could convey no part of the fee to the respondents. We think the correct view is that, when an owner plats land bounded by a street included in his plat, and owns nothing beyond the street, and conveys all his land abutting upon the street without reservation, the purchaser acquires the fee to the entire street. *Gifford v. Horton, supra; In re Robbins*, 34 Minn. 99, 24 N. W. 356, 57 Am. Rep. 40; *Taylor v. Armstrong*, 24 Ark. 102; 37 Cyc. 200. This rule is pointedly stated in *Commissioners of Coffey County v. Venard*, 10 Kan. 95, where it is said:

"The vacation of a road does not take any person's private property. It leaves the property of individuals just as though no road had ever been established. If a party owns the land over which the road runs, his rights and privileges are increased by the vacation of the road, instead of being diminished. If he does not own the land over which it runs then of course no property of his can be taken from him."

The respondents have directed our attention to *Burmeister v. Howard*, 1 Wash. Ter. 207; *Norton v. Gross, supra; Thomas v. Hunt*, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857. In the *Burmeister* case, both parties claimed under a common grantor who had platted the property, including the alley in controversy, and the court was considering the effect of the proceedings of the board of trustees had under

the old statute, Rem. & Bal. Code, § 7846. In the *Norton* case, we held that, as between the vendor and the vendee, a deed to specific property carried with it by implication a quadrangular strip of land abutting upon it, which strip had formed a part of an alley to the rear of the property but which had been vacated before the property was conveyed. In the *Thomas* case, the vacated avenue was the eastern boundary of an addition as platted, but the land lying east of and adjoining the avenue was owned by the proprietors of the platted addition. The court recognized the rule that, in the absence of a controlling statute or apt words of reservation in the deed, where a street is within the dedicator's land and forms its boundary, the conveyance of an abutting lot would carry the fee in the street to the opposite boundary thereof.

There remains to be considered the contention that the appellants are estopped by their representations to assert title, and that the payment of assessments for the establishment and maintenance of the street gave the respondents equities in the land when the street was vacated. It seems quite plain that no rights inured to the respondents upon the vacation of the street in consequence of assessments contributed to its maintenance and improvement. These assessments were levied to improve the street as a public highway, and not to improve it as private property.

Coming to the question of estoppel *in pais*, the record discloses that the appellants acquired title to their property in undivided equal moieties, at one and the same time and through one and the same instrument. They assert that this created a joint tenancy, and that the representations of one joint tenant cannot estop his cotenant. We do not find it necessary to decide whether the appellants are joint tenants (Rem. & Bal. Code, § 1344), or tenants in common; as in either case one cotenant cannot estop another by his unauthorized words or acts. This must be so, for as we have seen, an undivided one-third of the fee in the street

passed to each of the appellant husbands as an incident to the acquisition of the abutting property.

The finding of the court that the respondents were induced to sign the petition by the representations of the appellants that the easterly half of the street would become the property of the former when the street should be vacated, is sustained by the evidence as to the appellants Jones and Gidner. The appellant Rowe made no such representations, and had no knowledge that they were made until after the commencement of the action. He says, that he and his cotenants decided to take the necessary steps to bring about the vacation; that he knew that the respondents' signatures were necessary, but that his cotenants had no authority to make any representations on his behalf or to surrender any of his rights. There is no evidence to the contrary. He had a fee interest in the property, and the mere fact that his cotenants circulated the petition with his knowledge and consent did not authorize them to surrender any of his rights in the property, either directly or indirectly. They could no more agree that he would surrender a portion of his land in return for the signatures of the respondents, than that he would pay an agreed sum of money.

We think, however, that the appellants Jones and Gidner are estopped by their representations to assert ownership in the portion of the land awarded to the respondents. The petition was unavailing until it had been signed by the owners of more than two-thirds of the private property abutting upon the street sought to be vacated. Rem. & Bal. Code, § 7840; *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797. This could not be accomplished without the signatures of the respondents. They testified that they would not have signed the petition but for the representations of Jones and Gidner. Relying upon these representations, they surrendered their easements of access, light, and air in the street. The basis of all estoppel *in pais* is that there is one innocent party and one negligent or wrongdoing party, and the doc-

trine means that, when the innocent party has been induced to surrender a valuable right or to change his position to his prejudice relying upon the acts or representations of the negligent or wrongdoing party, then the latter will not be heard to assert the falsity of his acts or representations to the prejudice of the former. *Carruthers v. Whitney*, 56 Wash. 327, 105 Pac. 831, 134 Am. St. 1114; *Dickerson v. Colgrove*, 100 U. S. 578.

But counsel for appellants argue, that the representations were but an expression of the opinion of Jones and Gidner, upon the legal effect of the vacation; that they were innocently made, and that they are therefore not estopped to assert their full legal rights. This argument is fallacious.

"Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided, or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements, or acts of the other party. When the mistake of law is pure and simple, the balance held by justice hangs even; but when the error is accompanied by any inequitable conduct of the other party, it inclines in favor of the one who is mistaken. The scope and limitations of this doctrine may be summed up in the proposition that a misapprehension of the law by one party, of which the others are aware at the time of entering into the transaction, but which they do not rectify, is a sufficient ground for equitable relief." 2 Pomeroy, Equity Jurisprudence (3d ed.), par. 847.

A like principle is announced in *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609. But the appellants Jones and Gidner are not in a position to suggest an innocent error of law. Jones says that he knew the status of the property

and that he made no representations whatsoever. In the latter statement he is contradicted by five witnesses. Gidner says that he stated to the respondents, when the first petition was presented to the council some four years prior to the presentation of the successful petition, that, upon vacation, the owners of the respective abutting tracts would take in equal shares; that before the presentation of the last petition he learned that such result would not follow; that he did not advise the respondents of his error, and that he made no such representations to them at the time they signed the final petition. In the latter statement he is opposed by the testimony of three witnesses. Nor is the contention sound that one cannot be estopped by his representations to assert his title to real property. *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030; *Carruthers v. Whitney*, *supra*; *Windsor v. Sarsfield*, 66 Wash. 576, 119 Pac. 1112.

The judgment is affirmed as to the appellants Jones and Gidner; and the case is remanded with directions to modify the judgment so as to award an undivided one-third of the easterly fifteen feet of the land to appellants Rowe.

MOUNT, C. J., CHADWICK, CROW, and PARKER, JJ., concur.

[No. 10650. Department Two. December 12, 1912.]

UNITED IRON WORKS, *Appellant*, v. HURLEY MASON COMPANY, *Respondent*.[1]

DAMAGES—INJURY TO PROPERTY—EVIDENCE—SUFFICIENCY. It is error to grant a nonsuit in an action for damages to property, where it appears that defendant wrongfully took possession of new machinery without the consent of a conditional sales vendee, after being informed of plaintiff's title, and afterwards delivered it to the plaintiff in a worn out condition by reason of abuse and use; and it is not necessary that plaintiff show the exact damages alleged in the complaint.

[1]Reported in 128 Pac. 209.

ACTIONS—CONDITIONS PRECEDENT—DEMAND. Demand is not a condition precedent to an action for damages to property wrongfully taken without the consent of the owner.

EVIDENCE—PAROL EVIDENCE—OWNERSHIP OF PERSONAL PROPERTY. Title to personal property may be shown by parol evidence.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered May 24, 1912, dismissing an action in tort, on granting a nonsuit. Reversed.

Revelle, Revelle & Revelle, for appellant.

T. L. Stiles, for respondent.

FULLERTON, J.—The appellant brought this action against the respondent to recover damages for an injury to certain of its machinery caused by the wrongful use thereof on the part of the respondent. In its complaint, the appellant alleged ownership of the property, its wrongful taking and use by the appellant, injury and damage to the property by such wrongful use in the sum of $1,676, and a demand on the respondent by the appellant for such damage. The answer was a general denial. At the trial, which was being had before the court without a jury, the court, at the conclusion of the appellant's case in chief, sustained a motion for a nonsuit, and entered a judgment dismissing the action. This appeal followed.

The record discloses that the respondent entered into a contract with the Northern Pacific Railway Company to do certain work in the construction of its railroad between Tenino and Kalama, and sublet certain concrete work, which it was required to perform at the crossing of Toutle river, in Cowlitz county, to one Ackerman; that Ackerman, preparatory to performing the work, contracted to purchase from the appellant, under a conditional bill of sale, the machinery in question here, which consisted of two hoisting engines and one concrete mixer; and that the machinery was contracted for in May, 1910, and shipped to Ackerman at his place of work on Toutle river during the same month, where

it was set up by him and made ready for the work required of it. Later on, and before the machinery had been used by Ackerman (July 9, 1910), the respondent, conceiving that Ackerman was not performing his contract according to its conditions, canceled the contract, and according to Ackerman's testimony, took possession of his outfit, including the machinery here in question, after he had made known to it that such machinery was the property of the appellant. Ackerman further testified that in February, 1911, he saw the property in the possession of the respondent in its warehouse at Tacoma; that it was then in a badly damaged condition, the engines showing that they had "had bad handling; the valves were worn, that is, were gone; the drums cut through practically by excessive wear of the wire rope; covered with mud showing hard usage;" and that the concrete mixer "had a lot of it gone, some of the castings were broken; badly damaged." That when the machinery was taken from him by the respondent it was of the value of $2,640, whereas when he saw it in Tacoma it was not worth to exceed $800. An officer of the appellant also testified to the return of the property to the appellant in the summer of 1911, and to the value of the property when so returned; stating that its value at that time was about one thousand dollars. The last mentioned witness also testified to the condition of the property. He said that the engines had been "practically stripped of their fittings, some of the fittings being entirely missing; the pipe, considerable of it was missing; one engine in particular showed very hard usage and abuse, as shown in the cutting of the drums by the wire ropes. . . . . The concrete mixer had some castings broken off it, and the skids were damaged, and it showed use and abuse." The witness also testified that he had demanded an adjustment of the damages from the respondent.

The respondent, in its brief, contends that the appellant under the issues made by its complaint and the answer of the respondent thereto, undertook to support four propo-

sitions, namely: (1) That respondent wrongfully took possession of property belonging to the appellant; (2) that respondent, against appellant's will, held the property in its possession and used it for a long period of time; (3) that the respondent injured and damaged the property to the extent of $1,676; and (4) that appellant had demanded pay for the damage and had been refused; and argues that the proofs failed upon each of these propositions. But without again rehearsing the evidence, it seems to us that there was substantial evidence tending to establish each of them. As to the first, the fact that possession was taken by the respondent was not only directly testified to by Ackerman, but the property was afterwards found in the respondent's possession by the appellant and delivered by the respondent directly to the appellant. That it was wrongfully taken is evidenced by the fact that the respondent took it over against the will of Ackerman, to whom it had been intrusted, without the permission of the appellant, after the respondent had been made acquainted with the appellant's interest therein. That the respondent used it is made evident by the condition of the property when it was returned to the appellant; the property being new when the appellant received it, and returned in a worn and damaged condition. As to the third proposition, it was not necessary to a recovery that the appellant prove damage to the property in the exact sum named in the complaint. To prove substantial damages, whether the amount be less or more than that alleged in the complaint, was a compliance with the burden the appellant assumed in this regard. True, the respondent says that there was no evidence that it damaged the property. But the record shows that the respondent took the property when it was new and turned it back after it had been substantially worn out by abuse and use. Clearly the burden was on it to account for this change of condition; and, unless it so accounted, it could properly be held liable for the loss caused thereby. There was direct evidence

in the record that a demand had been made upon the respondent at two different times for an adjustment of the damages claimed. But were the fact otherwise, it would not be fatal to the action. After having shown that the property was taken possession of by the respondent without its consent, demand for the damages caused the property while in possession of the respondent was not a condition precedent to the right to maintain an action for such damages.

We have not overlooked the claim of the respondent that the appellant failed to show title in itself in the property. But appellant's ownership thereof was testified to not only by the appellant's representative, but by Ackerman himself. This was sufficient. Title to personal property in this state is not a matter of record, and can be shown by parol.

There was substantial evidence on all of the issues, and the trial court erred in refusing to give it effect and in failing to put the respondent upon their proofs. The judgment appealed from is reversed, and the cause remanded for a new trial.

MOUNT, C. J., MORRIS, MAIN, and ELLIS, JJ., concur.

[No. 10565. Department One. December 12, 1912.]

DANIEL L. SLIPPER, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

STREET RAILWAYS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A pedestrian, struck by a cable car, is guilty of contributory negligence, as a matter of law, where it appears that he started diagonally across a street, paying no attention to a street car, which was in plain view and making considerable noise, nor to warning shouts; and he is not exonerated by the fact that he was slightly deaf, and from the country, and not used to street cars.

SAME—NEGLIGENCE—LAST CLEAR CHANCE—EVIDENCE—SUFFICIENCY. The evidence of a gripman that he could have stopped a cable car within five or six feet and in time to avoid an accident to

[1]Reported in 128 Pac. 233.

a negligent pedestrian, if the brakes had not been defective, does not warrant a finding that the defendant had the "last clear chance" to avoid the accident, where it appears from other evidence that the car, a heavy cable car thirty feet long, going down grade at a rate of 14 feet per second, was stopped within fifteen or twenty feet, an emergency stop required the movement of two levers taking two or three seconds, and there was expert evidence that it could not have been stopped inside of from 30 to 60 feet, and the car had been operated all day and nothing found to be the matter with the brakes, since a "good stop" was shown; especially since a quicker stop might have endangered the passengers.

Appeal from a judgment of the superior court for King county, Myers, J., entered February 27, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by a street car. Reversed.

James B. Howe and *A. J. Falknor*, for appellant.

Kellogg & Huntoon, for respondent.

CHADWICK, J.—Daniel Slipper, an elderly man, slightly deaf, was crossing Madison street in the city of Seattle, and was struck by a cable car operated by defendant. He brought this suit, alleging negligence of the defendant, in "that at the time of said accident and for several days prior thereto, the brakes upon such cable car were out of order and in a defective and unworkable condition, and that this fact at the time of the accident and for several days prior thereto was well known to the defendant and its agents and employees." Negligence is also alleged in that the car was overcrowded, so that the gripman could not see the street in front and on the sides of the car. There was hardly a pretense of proving this charge; and inasmuch as the gripman testified that he saw plaintiff in time to avert the accident but for the defective brakes, we regard the last charge of negligence as of no consequence. Plaintiff stepped from the curb on Madison street and started diagonally to the south and west. Just as he started, a wagon passed and he

waited for it to get out of the way. It may be that the noise of the wagon obscured the sound of the cable at the time he left the curb; at any rate, he says he did not hear it. He paid no attention to the car, which was coming west, although there was nothing to obscure his view for at least a block and possibly a greater distance. The gripman observed him when he was eight or ten feet away and then, seeing that plaintiff was apparently oblivious of the presence of the car, shouted to him, as others probably did. He threw on the brakes, but the right front corner of the car struck plaintiff, threw him to the ground, and rolled him under the running-board, from which position he was extricated by pushing the car back so as to clear the running-board. Other facts must necessarily be referred to in the body of our opinion and will not be noticed here. From a verdict in favor of the plaintiff, defendant has appealed.

Appellant interposed a motion for a nonsuit and other timely motions and objections during and after the trial, in order to save its defense, which was that plaintiff was injured in consequence of his own negligence. Counsel for respondent insists that he was not negligent because of the facts following, all of which were proved in a way upon the trial: That the plaintiff was an elderly man; that he had lived all of his life in small towns in which there were no street cars; that he had been in Seattle only five months; that during that time he had not used the street cars at all; that he had never been in that part of the city where the accident occurred; that it was a residence district, and consequently not subject to heavy traffic; that he stopped and waited for a vehicle to pass, showing that he was cautious; that he looked in the direction the car came from before leaving the curb; that he did not know that there was a car line on Madison street; that he did not discover it until he was practically upon the track.

If these facts, severally or collectively, exonerate respondent, then it must be written into the law that the pedestrian

upon a city street no longer owes a duty to himself. He should have been to some extent at least, mindful of his own safety. The cable makes quite a noise and the car makes an even greater noise. The track itself was a sign and warning of danger; it was under his eye and must have been seen if he was looking in the direction in which he was going. He could not assume that the gripman could have known of his infirmity or his lack of knowledge of the ways of the city. It would seem that a man from the country would be the more impressed with the objects and dangers of the street than one who, because of greater familiarity, might become careless and oblivious thereto. More than this, the fact that a man is approaching a street car track and is from four to eight feet away is not in itself a warning to the motorman or gripman, or notice to him that a pedestrian will endeavor to pass in front of the car. It is a matter of common knowledge that men will stop when within a few feet or quite abreast of a passing street car. Up to a certain point, to be measured by the facts of the particular case, a gripman has a right to assume that a pedestrian is exercising and will continue to exercise due care.

We have said that there is no duty upon the pedestrian to stop, look, and listen before crossing a street car track (*Morris v. Seattle, Renton & Southern R. Co.*, 66 Wash. 691, 120 Pac. 534, and cases there cited); but we have never said, nor has any court, that a pedestrian is not required to exercise reasonable and ordinary care, prudence and vigilance to avoid a collision. *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458.

But granting that plaintiff did not have to stop or look, there was the noise of the car which was in his immediate presence, the cable, the bell and the shouts, all of which should have been heard and should have summoned him from his abstraction. He might continue in motion; he might close his eyes; but his ears were open and, though slightly deaf, there is no evidence tending to show that he could not

hear ordinary sounds and conversation. We have no doubt of respondent's contributory negligence, and so hold.

The only remaining question is whether a recovery can be had because of the alleged negligence of the appellant. It is contended that all we have said may be true, but inasmuch as the gripman testified that the brakes on the car were out of repair and that he could have stopped the car but for that reason, that the verdict must be sustained. The doctrine of last clear chance is not discussed in the briefs, nor was it referred to in the argument; neither have we the instructions of the court. But assuming, without discussing or admitting, that respondent can maintain his recovery without relying upon that doctrine, we shall proceed to inquire whether the defective brakes—we must find that they were so, because the jury so found, although it seems to us to be in the teeth of a great preponderance of the evidence—was the proximate cause of the injury. The gripman, who is no longer in the employ of the appellant, testified that he could have stopped in time to avoid the accident, if the brakes had been in good order; that he had told the barn foreman at 7 o'clock in the morning that the brakes were defective. The accident occurred at 3:18 in the afternoon. The gripman signed a written report of the accident. There was no mention made in that report of the defective brakes, but a supplemental report was made later in the day in which he stated that the brakes were defective. There is no evidence tending to show wherein they were defective, except that "they would not hold, some way." There was expert testimony tending to show that a car 30 feet long, going the speed of the cable, which was approximately 10 miles an hour or 14 feet per second of time, could not be stopped inside of 30 feet, and from that to 60 feet. To make an emergency stop, the gripman had to throw two levers. He estimates that it would take two or three seconds to do this. It is obvious that it would take that long, probably longer. He says he stopped his car in from 15 to 20 feet. Was it

a good stop, or such a stop as might be expected had the brakes been in order? We think it was. Passengers and bystanders say the car stopped "remarkably quick, I would have said it was remarkable the way he stopped the car so quickly. . . . How quick did the car come to a stop? It was between 10 and 15 feet it went. . . . How far did the car go after it struck the man? I don't know, I think about 10 feet. My impression was that he did well in stopping in such a short time, remarkably well. . . . How far did the car go after it struck him? Maybe 10 feet, 15 feet, not over 15 feet." And the gripman who was the principal witness in behalf of respondent says on direct examination: "Now after striking Mr. Slipper how far did the car go before you could get it under control? It must have been from 15 to 20 feet." In his written report made at the time of the accident, and which was confirmed by the witness when under cross-examination, he says: "The car went 5 or 6 feet after striking the man." It seems to us that we are not bound to accept the statement of the gripman that he could stop a big, heavy car, 30 feet long, moving on a down grade at the rate of 14 feet per second of time, in five or six feet—the reach of a man's arms—and reject all common knowledge and utterly defy all physical facts. If he stopped in 15 or 20 feet, this must of necessity be nearer the truth. It might have been a greater distance without implying negligence under the weight of the evidence, or we might say the only evidence covering the technical problems involved. The car had been operated all day; another gripman had made two round trips at noon, and testifies that he found nothing wrong with the brakes. Although we may assume that the brakes did not always set, they must have worked a greater part of the time; and from the whole record we do not hesitate in concluding that they did work at the time of the accident. The gripman having made a "good stop," the appellant, through him, did its whole duty, and cannot be charged with negligence.

There is another item that may be considered. Accepting the statement as true that the car could have been stopped in five or six feet, we may well ask ourselves whether appellant would not have put the passengers on the car to as great, if not greater, hazard than was the respondent. A carrier must exercise reasonable care to protect pedestrians; it owes the highest degree of care to its passengers. It cannot fulfill the latter duty, nor does the law require it, in an emergent situation, if it stands a car loaded with passengers on end. We are impressed in this case with the words used in the case of *Borg v. Spokane Toilet Supply Co.*, 50 Wash. 204, 96 Pac. 1037, 19 L. R. A. (N. S.) 160:

"Had the appellant been the superior force in this instance, causing the injury to the respondent or to some third person, there could be no question as to his negligence."

The case of *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471, we think is directly in point; as is also the case of *Plinkiewisch v. Portland R. Light & Power Co.*, 58 Ore. 499, 115 Pac. 151. It was held in the *Dimuria* case that the party injured was guilty of contributory negligence, precluding a recovery, in failing to look for approaching teams, or to take any other precautions for his personal safety.

The judgment of the lower court is reversed, with instructions to enter a judgment for the appellant notwithstanding the verdict.

MOUNT, C. J., GOSE, CROW, and PARKER, JJ., concur.

[No. 10805. Department Two. December 13, 1912.]

ARTHUR H. INGHAM, *Administrator etc., Appellant*, v. HARPER & SON, *Respondent*.[1]

APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY. The jurisdiction on appeal, as depending on the amount in controversy, is determined by the allegations of the complaint, not by the demand for judgment.

COURTS—RULES OF DECISIONS—STARE DECISIS. The maxim *stare decisis* cannot be evoked as to matters merely discussed in an opinion, but not involved as essential elements.

APPEAL—DECISIONS REVIEWABLE—ORIGINAL AMOUNT IN CONTROVERSY—INTEREST. The original amount in controversy, within the jurisdiction of the supreme court includes interest, when recoverable, on the principal sum demanded to the time of the commencement of the action, and not to the date of judgment.

Appeal from a judgment of the superior court for King county, Carey, J., entered July 1, 1912, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Dismissed.

Willett & Oleson, for appellant.

Wright & Kelleher and *Edward W. Allen*, for respondent.

ELLIS, J.—The respondent has moved to dismiss this appeal, on the ground that this court has no jurisdiction to entertain it for the reason that the original amount in controversy does not exceed $200. The complaint set up two causes of action. The first was for $22 and interest from May 8, 1911, the second was for $170.75 and interest from the same date. The whole principal amount sued for was, therefore, $192.75. The prayer was for $205.52.

It is well established that the amount in controversy as limiting the right of appeal is determined by the averments of the pleadings, not by the demand for judgment. *Doty v. Krutz*, 13 Wash. 169, 43 Pac. 17; *Incorporated Town of*

[1]Reported in 128 Pac. 675.

Central City v. Treat, 101 Iowa 109, 70 N. W. 110; *Seward v. Steeley*, 29 Ind. App. 689, 65 N. E. 216; *Williamson v. Brandenberg*, 133 Ind. 594, 32 N. E. 834; *Schacker v. Hartford Fire Ins. Co.*, 93 U. S. 241.

The clause of § 4, art. 4, of the constitution, limiting the appellate jurisdiction of this court, reads: "excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property, does not exceed the sum of two hundred dollars." Whether we have the constitutional power to entertain this appeal must be determined by the answer to the question, What was "the original amount in controversy?" The appellant contends that it was the amount of the principal with interest to the date of trial. The respondent contends that it was either the principal sum claimed; or, at most, that sum with interest to the date of the commencement of the action. Whether any interest should be included, and if so, to what date it should be computed in determining the original amount in controversy, has never been decided by this court in a case where jurisdiction was dependent upon that single element. The nearest approach to a definite expression of this court upon this subject to which our attention has been called is found in *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469, where is was held that jurisdiction was assured by the fact that the original amount in controversy stated in two causes of action, one for $200, the other for $500, was $700, an exception having been saved to an order sustaining a demurrer to the second cause of action, thus reserving the right of review as to both causes of action in this court. The court said:

"The demand, however, remained seven hundred dollars, and there was no amendment making it less. Inasmuch as the allegations of the first cause of action tended to show a right in the plaintiffs to compensation for services rendered of the value of two hundred dollars, for which demand had

been made before suit, the proper judgment would have been two hundred dollars with interest thereon from the date of the demand until the judgment, something more than two hundred dollars; therefore it was proper that the prayer of the complaint on that cause of action should be more than the bare principal, which would have given this court jurisdiction."

A reading of the whole opinion makes it manifest that the last sentence was not intended as expressing the real ground of the decision. It is equally manifest that interest computed to the date of the commencement of the action would also have made "something more than two hundred dollars." In any view of the case, therefore, the breadth of language above quoted was unnecessary to the conclusion reached. The maxim *stare decisis*, invoked by the appellant as making this language conclusive upon us, has no application. That maxim contemplates:

"Not whatever a court may happen to say, in a perhaps discursive argument of a cause, or even several causes, but has regard only to points and adjudications actually involved, as essential elements, in the questions in actual controversy." Wells, Res Adjudicata and Stare Decisis, § 581.

See, also, *Cohens v. Virginia*, 6 Wheat. 264-399.

In *National Surety Co. v. Bratnober Lumber Co.*, 67 Wash. 601, 122 Pac. 337, the question of interest as an element in determining the appellate jurisdiction was not discussed. We have been cited to no prior decision of this court, nor have we found any, which can be taken as such positive authority upon the point here involved as to foreclose its further consideration.

We will preface the further discussion by adopting what seems to us a necessary view, that interest to one date or the other should be included, for the reason that, where interest is allowable at all, it is because the interest is an incident to the principal demand. There still, however, remains the question as to what date interest shall be included in determining the *original* amount in controversy.

. In considering decisions from other jurisdictions, as pointed out in *Bleecker v. Satsop R. R. Co.*, 3 Wash. 77, 27 Pac. 1073, regard must be had to the statutory or constitutional provisions there involved. In some, the jurisdiction is determined by "the amount in controversy exclusive of costs;" in others by "the amount in controversy exclusive of interest and costs;" in many, merely by "the amount in controversy" or "the amount involved." Obviously this last provision more nearly approaches the meaning of our own constitutional limitation to the *original* amount in controversy than does either of the others. Under provisions making the appellate jurisdiction depend upon the amount in controversy, the amount involved, or using similar terms without other qualifications, the Illinois, New York, and Louisiana courts have held that, in determining that amount, interest should be included only to the time of the commencement of the action. *Keiser v. Cox*, 116 Ill. 26, 4 N. E. 384; *Lydston v. Auburgh*, 216 Ill. 210, 74 N. E. 796; *Josuez v. Conner*, 75 N. Y. 156; *Rogers v. Goldthwaite*, 32 La. Ann. 48; *Owen v. Boyd*, 7 La. Ann. 109; *Murphy v. Murphy*, 207 Ill. 250, 69 N. E. 966.

In *Lydston v. Auburgh*, *supra*, it is said:

"The amount involved in a suit is the amount in controversy between the parties at the time the suit is brought, and interest accruing during the pendency of the suit cannot be added in order to make up the amount necessary to an appeal to this court. *Keiser v. Cox*, 116 Ill. 26, 4 N. E. 384; *Murphy v. Murphy*, 207 Ill. 250, 69 N. E. 966; 2 Cyc. 563. The amount involved in this suit when it was commenced was the amount claimed to be due for principal and interest on the notes up to that time, and the fact that the suit was pending for many years did not operate to confer jurisdiction on this court. In a case where there could be no appeal if it had been decided at once, the right to appeal is not acquired by the fact that the suit is pending for a long time in the trial court, and that the judgment has been enlarged by accruing interest."

This language seems even more applicable under our constitutional provision. The framers of the constitution must be presumed to have used the words "original amount" advisedly. The most obvious meaning and purpose of the word "original" in its connection is to limit the amount to the time when the matter first originates as a controversy in court; that is, to the time when the action is commenced. In view of the language used, we can hardly assume that the framers of the constitution intended to make the appellate jurisdiction of this court dependent upon the fortuitous circumstance of a crowded trial docket or a procrastinating litigant, which would be the case if interest to the time of trial were allowed to make up the jurisdictional amount. To so hold would, as it seems to us, deprive the word "original" of any obvious meaning. The rule that the amount due according to the plaintiff's claim at the commencement of the action should govern in determining his right of appeal is certain and definite and more in harmony with the constitutional limitation to the *original* amount in controversy than any other. It is his original claim, the amount to which he would be entitled upon an immediate confession of judgment.

We have examined with care the cases cited by the appellant. They seem to us hardly applicable to the peculiar wording of our constitution. In the case before us, the claims accrued on May 8, 1911. The suit was commenced on December 13, 1911. The principal, $192.75, with interest from the one date to the other, would amount to $199.66. This, the original amount in controversy, being less than $200, we have no power to entertain the appeal. It is therefore dismissed.

MOUNT, C. J., FULLERTON, MAIN, and MORRIS, JJ., concur.

[No. 10445. Department One. December 13, 1912.]

W. F. Ritchardson, *Respondent*, v. W. D. Ingalls *et al.*, *Appellants*.[1]

Appeal—Record—Statement of Facts—Necessity. In the absence of a statement of facts or bill of exceptions showing the evidence admitted at a trial on the merits, error cannot be predicated on refusing to require the complaint to be made definite and certain.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered March 29, 1911, upon the verdict of a jury rendered in favor of the plaintiff for damages for an assault and battery. Affirmed.

Frank A. Luse, for appellants.

Snively & Bounds, for respondent.

Crow, J.—This action was commenced by W. F. Ritchardson against W. D. Ingalls and Inga J. Ingalls, to recover $2,000 damages for personal injuries. In paragraph 2 of the original complaint, plaintiff alleged that, as a result of an assault which defendants made by beating him with a shotgun, he sustained injuries to his right arm and other parts of his person, which prevented him from working or attending to his business. To this complaint, the defendants interposed a motion which, omitting formal parts, reads as follows:

"That the plaintiff be required to make paragraph two of the complaint more definite and certain by setting out the injuries that he received in detail, and by setting out the length of time which said injuries prevented him from doing his work and attending to his business, and by setting out the items of damage comprising the two thousand dollars which he claims to have been damaged."

Upon the hearing of the motion, the trial judge ordered that the complaint be made more definite and certain, by set-

[1]Reported in 128 Pac. 638.

ting out the injuries complained of, and by stating what injuries the plaintiff had suffered outside of those upon his arm, and further ordered that as to all other matters the motion be denied. Thereupon the plaintiff amended his complaint by alleging in paragraph 2 that he:

"Sustained many and severe bruises upon his right arm, to wit: That the cords and muscles in the said right arm were bruised and battered up, and the flesh was made black and blue as a result of the beating with said shotgun, and that for a long time thereafter this plaintiff did, and does at the present time, suffer great pain as a result of said beating with said shotgun. That said plaintiff was unable to do any lifting or hoeing or pumping with said right arm, and was greatly handicapped in doing other work which it was his place to do in caring for the ranch whereon he is employed as foreman. And that at the present time, when he does any lifting or hoeing or pumping with his right arm, it gives him great pain, and will continue to give him great pain for a long time to come."

The issues were completed, and on trial a verdict for $350 was returned in plaintiff's favor, upon which judgment was entered. The defendants have appealed.

The only assignment is that the trial court erred in not requiring plaintiff to plead the length of time his injuries prevented him from doing his work or attending to his business, and to also plead the items comprising the damages claimed. The record contains no statement of facts, none having been proposed, filed, or certified. The cause is here on the pleadings, the order on the motion, and the final judgment. It nowhere appears that appellant interposed any motion to the amended complaint, and we are not advised as to what occurred during the trial. In *Helbig v. Grays Harbor Elec. Co.*, 37 Wash. 130, 79 Pac. 612, in an action for personal injuries, this court held that the denial of defendant's motion to make a complaint more definite and certain as to injuries sustained was not prejudicial error when, upon the trial, no evidence of injuries other than those

pleaded was admitted. We are not advised as to the evidence admitted upon the trial of this action, either as to the injuries inflicted, the period of their continuance, or the damages sustained. Were we to hold, which we do not, that the amended complaint is indefinite and uncertain, we could not reverse the judgment. We must presume that the evidence was properly restricted. The damages were sufficiently pleaded, and it is apparent from the allegations of the amended complaint that the alleged injuries continued until the date of its filing. The damages awarded, which are not assailed as excessive, were for the exclusive consideration and determination of the jury.

The judgment is affirmed.

MOUNT, C. J., GOSE, PARKER, and CHADWICK, JJ., concur.

[No. 10498. Department One. December 13, 1912.]

MARGUERITE PAYNE, *Respondent*, v. LINDSEY COMPANY, *Appellant*.[1]

SALES—RESCISSION—FALSE REPRESENTATIONS. A sale of a cafeteria business will be rescinded for false representations to the effect that the business was being conducted at a profit, where it was the principal inducement leading to the sale and the purchaser had no means of ascertaining its truth.

SALES—RESCISSION—RESTORATION OF STATUS. A rescission of a sale of a cafeteria business will not be denied for the reason that the purchaser discontinued the business and cannot restore it in the same condition as when received, where it was tendered back in substantially the same condition and inability to make full restitution was not the fault of the purchaser.

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS. After a trial on the merits without objection, it cannot be urged on appeal that the action should have been tried at law as one for damages and not as one for equitable relief.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 9, 1912, upon findings in favor of the plaintiff, in an action for rescission. Affirmed.

[1]Reported in 128 Pac. 678.

John E. Humphries, *M. M. Minkler*, and *William A. Johnson*, for appellant.

Wm. Brueggerhoff, for respondent.

PARKER, J.—The plaintiff commenced this action in the superior court, seeking a judgment for rescission of a sale made to her by the defendant of a cafeteria business and the furniture used therein, and for recovery of the purchase price thereof paid by her to the defendant, upon the ground of false and fraudulent representations alleged to have been made to her by the president of the defendant corporation, inducing her to make the purchase. A trial in the superior court resulted in findings of fact made by the trial court, from which it concluded that the plaintiff was entitled to a judgment against the defendant in the sum of $750, the amount paid by her as the purchase price, upon her executing a bill of sale for the property to the defendant. A bill of sale was thereupon immediately executed by the plaintiff to the defendant, and placed in the hands of the clerk of the court, and judgment rendered in the plaintiff's favor accordingly. From this disposition of the cause, the defendant has appealed.

For a period of four months prior to September 12, 1910, appellant owned a cafeteria, situated in the neighborhood of the state university, in Seattle. Hiram Lindsey was then president of appellant corporation, and had the entire management and control of its business. During this period, appellant was not able to conduct its cafeteria as a paying business. Even according to the testimony of Lindsey, the business did not yield over $30 profit during this whole period of four months. Other evidence indicates that it was being run at a loss during this period. Early in September, Lindsey advertised the cafeteria and business for sale in a Seattle paper. Respondent called upon him in answer to this advertisement, and entered into negotiations looking to the purchase of the business. Respondent then had $750 in

money, which constituted practically everything of value she possessed. When she called upon Lindsey, they recognized each other as attendants of the same church though they did not know each other by name until then. She was a widow, inexperienced in the cafeteria business, and desired to invest her money in some small business in which she could make a living for herself and niece, a young girl who was dependent on her for support. Lindsey learned of these facts during their conversation prior to her agreeing to purchase the cafeteria. It is apparent that their church affiliation caused her to rely upon his statements as to the value and extent of the business more than she would otherwise have done. How she was influenced in this respect is shown by her testimony where, among other things, she says:

"I made the remark to him then: 'Mr. Lindsey, I am in good hands. The place will not be misrepresented to me because you are a member of the same church I go to.' He says, 'No, indeed, Sister, you will find no misrepresentation or no cheating by me, because I cannot afford to, either in a business way or in my church.' "

During their conversation, Lindsey told her, in substance, that the business was then a good paying business and making a profit, and that she could, during the coming nine months while the university was in session, make $2,000 in the business. This latter statement may be considered merely as an expression of opinion on the part of Lindsey, rather than a statement of an existing fact, but it nevertheless lent color to his statement as to the business then being profitable, and was manifestly intended by him to induce respondent to more firmly believe that the business was then in fact a good paying business. She had no other means of learning anything about the value or extent of the business and was by these statements induced to purchase the business, which was consummated the following day, September 12, when she paid appellant $750, and received a bill of sale for the property. On the following day, September 13, she

took possession and continued to conduct the business until December 9, when she was compelled to discontinue it and remove the furniture and fixtures, because of her inability to pay the rent. During this period, the business did not yield her any profit, but resulted in some considerable loss, though it is evident that she conducted it in substantially the same manner as appellant had conducted it before the sale to her. On November 28, having become convinced that the business could not be made profitable and that it was not a paying business at and prior to the time of the sale, such as Lindsey had represented it to be, she tendered it back to appellant and demanded the return of the $750 she had paid therefor. At that time the furniture and fixtures were in substantially the same condition as when she received them, and the business was still running the same as when she received it, though the daily receipts thereof had slightly decreased. On December 9, appellant not having acceded to her demand to take the business back and return her the purchase money, she discontinued the business and stored the furniture and fixtures and commenced this action.

The trial court rested its decision in respondent's favor upon the theory that Lindsey, appellant's president, falsely represented to her that the business was a paying business at the time of the sale, that she relied wholly upon such representations, and that under the circumstances she was justified in so doing, and was thereby induced to purchase the business. It is contended by counsel for appellant that the evidence does not support the court's findings of these facts. The testimony of Lindsey and respondent is in conflict touching his statement to her as to the business being profitable at and prior to the time of the sale. This involves little less than a question of credibility of witnesses who testified orally before the trial court, and ordinarily would furnish sufficient reason for our accepting the facts as found by the trial court in so far as they rest upon such testimony. Lindsey positively denies making the statements attributed

to him by respondent touching the profits of the business at and prior to the time of the sale; but it is manifest from all the circumstances shown that respondent was led to believe that she was acquiring an established business which was then being conducted with substantial profit, and that Lindsey's conversations with her during the negotiations were such as to induce her to believe that she was acquiring such a business, even though there may be some uncertainty as to the exact language used by him to her upon the subject of the profits of the business. The surrounding circumstances point strongly to the conclusion that Lindsey intended her to believe that she was acquiring a business which was then being conducted at a profit, and that she was induced to so believe by his statements then made to her. That the business was not in fact at that time conducted at a profit, and never had been by appellant during the four months previous, seems to us to be almost conclusively proven by the evidence. It seems equally clear to us that her belief that the business was at that time an established, profitable business was the principal inducement for making the purchase. Under all the circumstances, we think the learned trial court's conclusions find ample support both in fact and law. Our decisions in the following cases lend support to this view: *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Johnson v. Ryan*, 62 Wash. 60, 112 Pac. 1114; *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183.

Counsel for appellant invoke the general rule that equity will not grant rescission of a contract where the circumstances of the case are such that the parties cannot be placed in substantially the same situation they occupied when the contract was made. This rule is invoked upon the theory that, the business having been discontinued, it is not now possible to place the parties in the same position in which they were at the time the contract was made. If this condition had resulted from the fault of respondent, there might be some ground for this contention. We have seen that on

the 28th day of November, when she tendered back to appellant the cafeteria and business, it was in substantially the same condition as when she received it. Had appellant taken the property back and returned the purchase money at that time, the parties would have been in substantially the same situation as at the time of the sale. It is plain that thereafter she did all that was possible to preserve the property and the business and prevent its deterioration in value. Under such circumstances we do not think this general rule can be successfully invoked here against respondent's claim of rescission. In the text of 24 Am. & Eng. Ency. Law (2d ed.), at page 623, the rule applicable to such cases is stated as follows:

"Where the party seeking relief has by his own acts rendered restoration of the subject-matter or consideration impossible, rescission will generally be denied. But where his inability to make restitution is not the result of his deliberate and wilful act, but occurs without any fault on his part, and justice can be done without requiring him to restore what he received, then rescission will be granted and the equities of the parties will be adjusted by the final decree."

Some contention is made that the complaint does not state a cause of action for equitable relief. The theory of this contention seems to be that the action should have been commenced and prosecuted as one at law, since its ultimate object was only the recovery of money. We find issue was joined by an answer which is in substance a general denial of respondent's allegations of fraud against appellant. The complaint was not demurred to, nor was there any demand for a jury trial. Clearly the subject-matter of the action was within the jurisdiction of the court. It was tried upon the merits before the court upon these issues without any objection on the part of appellant. The contention here made appears for the first time in this court. We think that it is without merit. It is of no consequence now whether the relief sought and granted is legal or equitable.

We are of the opinion that the learned trial court has correctly determined the rights of the parties, and that its judgment should be affirmed. It is so ordered.

MOUNT, C. J., CHADWICK, GOSE, and CROW, JJ., concur.

[No. 9914. Department Two. December 14, 1912.]

CURT AKERS *et al.*, *Respondents*, v. W. H. LORD *et al.*, *Appellants*, E. S. WRIGHT, *Respondent*.[1]

COSTS—ON APPEAL—APPORTIONMENT. Where a judgment in consolidated actions to foreclose loggers' liens was given against defendants for $534.89, for an eloignment of logs valued at $1,500, and on appeal the judgment was sustained in part, modified in part and reversed in part, seven lien claims to the extent of $212.15 being sustained, and an eloignment found of only $660 in value, and the costs below on the seven claims not appearing in the record, the supreme court will apportion the costs in such arbitrary sum as appears from the whole record to be equitable; since the unsuccessful plaintiffs should not be charged with defendants' entire costs, which were largely incurred in an unsuccessful attack upon the seven claims sustained.

Motion to retax costs in the supreme court, filed March 9, 1912. Granted.

Tucker & Hyland, for appellants.

Robert A. Welch (*Winter S. Martin*, of counsel), for respondents Akers et al.

Jno. Mills Day, for respondents Krakenberger.

MORRIS, J.—This is a motion to retax costs, in consolidated actions to foreclose loggers' liens. The original case here will be found in 67 Wash. 179, 121 Pac. 51. The judgment appealed from was sustained in part, modified in part, and reversed in part. It will thus be seen a difficult question is submitted in determining how and against whom the costs of this court shall be taxed.

[1]Reported in 128 Pac. 672.

The judgment appealed from awarded judgment against appellants in the aggregate of $534.89, with costs to each plaintiff in the original suits. Just what these costs amount to cannot be told as it does not appear in our record. The judgment against appellants was given because of an eloignment of 40,000 feet of logs and 180,000 feet of lumber. The value was not fixed in the lower court, but using the same valuation as we used in fixing the amount we held had been eloigned, the value would be $1,500. We sustained the liens of seven of the respondents, amounting to $212.15, but found an eloignment of only 40,000 feet of logs and 60,000 feet of lumber, of the value of $660. This amount may or may not be sufficient to pay the seven judgments sustained. We do not know because of our inability to determine the costs in the lower court. The judgment of the lower court was reversed as to two claimants whose liens amounted to $322.74, and again sustained as to one claimant whose lien had been denied. Costs have been taxed against all respondents, upon the theory of a substantial reduction of the judgment as to seven of them, a reversal as to two, and the denial of the appeal of the one claimant not successful in the lower court. The $660, the amount we fixed as the value of the eloigned logs and lumber, is probably sufficient to pay the seven claims sustained by us and amounting to only $212.15, with the statutory costs which we may assume have been taxed by the clerk of the superior court. This would mean that, while the fund or liability fixed for the payment of these seven judgments has been substantially reduced, there yet remains sufficient to pay the amounts awarded. Hence the seven have lost nothing in this court, and costs cannot go against them. It would manifestly be most inequitable to charge the two respondents and one appellant who failed to sustain a judgment here with all the costs, since a large part of this cost is sustained by appellant in attacking the judgment against the seven respondents who have not lost on the appeal. The only thing to do is to apportion these

costs, which amount to $221.30; and as there is no rule to guide us in so doing, we can only examine the whole record and from that fix an arbitrary sum which, in our judgment, represents the costs the three parties defeated here should answer for. We know of no other way of determining the matter. This we have done and, upon consideration of the record and briefs as to these three parties, we fix the amount of costs against them at $100.

The motion to retax is granted, and the appellant is allowed $100 costs in this court against John Krakenberger, John Dimmock and Bernard Krakenberger. This court having made a substantial reduction in the eloignment fund fixed as the liability of appellants as to the liens here sustained, thus granting appellants a substantial part of the relief here prayed for, it is necessary to apportion the costs between appellants and these respondents, and as between them each party will pay his own costs.

MOUNT, C. J., MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 10203. Department Two. December 14, 1912.]

SPOKANE PORTLAND CEMENT COMPANY, *Appellant*, v. LEWIS LARSON *et al.*, *Respondents*.[1]

MINES AND MINERALS—LOCATIONS—ABANDONMENT—EVIDENCE—SUFFICIENCY. The evidence fails to show a legal establishment of placer mining claims, where it is evident that no actual discovery was made, the locations were not properly perfected nor labor done in compliance with the requirements of Rem. & Bal. Code, § 7367, the claims were abandoned more than one year prior to the commencement of an action to recover possession, and from the whole record, it appears that the attempted location was a speculative venture to prevent the use and development of a water power by others.

SAME. The fact that the major part of defendant's improvements were made after plaintiff's action was commenced is immaterial, where no attempt was made by plaintiff to prevent extensive improvements made in good faith.

[1]Reported in 128 Pac. 641.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial for newly discovered evidence is properly refused where there was no request for a continuance and no showing of diligence in procuring a witness who was found within a very few days after the trial.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered May 8, 1911, upon the verdict of a jury rendered in favor of the defendants by direction of the court, in an action of ejectment. Affirmed.

John M. Gleeson and *Joseph F. Morton*, for appellant.

F. C. Robertson (*Fred Miller* and *F. M. Goodwin*, of counsel), for respondents.

CROW, J.—Sullivan lake is situated in that portion of Stevens county which, since the commencement of this action, has been organized as Pend Oreille county. The lake is drained by a stream several miles in length, called Outlet creek, tributary to and discharged into the Pend Oreille river, near Metaline. About two miles below the lake, Outlet creek passes through a natural basin and thereafter continues its course through a gorge or canyon of great depth and narrow width. On November 17, 1906, George Walker and J. W. Ferguson, plaintiff's assignors, made two alleged placer mining locations in the basin near the gorge. It is now asserted that they then discovered valuable cement clay and gold on the claims. They also posted a notice of appropriation of one thousand cubic feet of water to be diverted from the lake and stream at or near the gorge, the same to be used for mining, manufacturing, electric and power purposes. On or about May 29, 1906, one Larson, predecessor of the defendant corporation, appropriated water from the stream and lake and later made a further appropriation which he followed by extensive surveys. His rights were thereafter transferred by mesne conveyances to the defendant corporation, which prior to the commencement of this action made additional surveys and projected improvements for the

development of a water power to be used in working certain cement mining claims which it owned near Metaline, in manufacturing cement, and in developing electric power. There is some dispute as to whether any valuable improvements were made by the defendant corporation prior to the commencement of this action, but it appears from the evidence that partly before and partly after the commencement of the action and prior to trial, in making surveys and improvements, in developing, diverting and using the water power, and in constructing an electric plant and a manufacturing plant near Metaline, it expended approximately $1,000,000. On March 2, 1907, the president of the United States, by proclamation, included within the Priest River Forest Reserve certain government lands which surrounded and included Lake Sullivan, Outlet creek, and the alleged placer claims involved in this action. The defendant corporation by proper procedure thereafter obtained permission from the Federal authorities to raise Lake Sullivan, to construct dams, drains, flumes, and ditches, to clear and flood certain public lands, and to develop and use the water power which it now claims within the forest reserve. In pursuance of this authority, it has proceeded with its development, improvements, and works, and has paid and is paying an agreed compensation to the national government for the privilege granted. In its development of the water power, it constructed a dam at the gorge or canyon on Outlet creek, which caused an artificial reservoir to be created over the basin in which the plaintiff's alleged placer claims are located, thereby submerging such claims. Plaintiff's predecessors, on behalf of themselves and certain associates, also made or attempted to make what they called an additional or amended location of two groups of placer claims of 160 acres each, extending from the gorge to Lake Sullivan, the same including the two original placer locations under which plaintiff still claims its rights. Further facts, shown with much elaboration and detail, appear

in the record, but the above statement will enable us to consider the issues now before us.

This action was commenced on November 30, 1909, by Spokane Portland Cement Company, a corporation, successor in interest to Walker and Ferguson, against Lewis Larson, John Doe Larson, W. N. Miller, and the Inland Portland Cement Company, a corporation, to recover possession of the two placer mining claims which were not then submerged, but are now submerged by the artificial reservoir. Plaintiff alleged that the claims had been located by its predecessors in interest; that certain labor, including the building of a cabin, had been performed thereon, and that the defendants had wrongfully ousted plaintiff from possession. The defendants denied plaintiff's alleged rights, denied the alleged ouster, pleaded title to an extensive water right in the defendant corporation, pleaded the improvements made by it, and asked that its title be quieted. On a jury trial, and at the close of plaintiff's evidence, the motions of the defendants Walker and Miller for a nonsuit and order of dismissal were granted, and at the close of all the evidence the trial judge directed a verdict in favor of the defendant corporation, upon which judgment was entered, quieting its title to its water right and enjoining the plaintiff from interfering therewith. From this judgment and decree, the plaintiff has appealed.

Appellant insists that the trial court erred in granting the nonsuit, in withdrawing the case from the jury, in directing a verdict, and in refusing a new trial. With painstaking care we have examined the entire record, which is voluminous and intricate. Many immaterial questions of law and fact have been presented. We only find it necessary to consider whether the appellant corporation had any valid locations upon which to predicate its claim to a possessory right in and to the alleged placer mining claims. Although its predecessors made an alleged water appropriation, it neither developed the same, nor did it, within the time fixed

by Rem. & Bal. Code, § 6318, commence any excavation or construction of works by which it intended to divert the water. We do not understand that it now makes any claim to the water for any purpose other than working its alleged placer mining claims. In its reply brief, appellant says:

"The plain, cleancut question in this case is as to the rights of plaintiff to the two placer locations numbered one and two, at the time the respondents ousted it from possession by backing up the water of Sullivan creek so as to flood these claims."

It again says:

"A great many pages of the brief [respondents'] are given to water location. Nothing of this kind is involved in this suit. The only water spoken of by appellants is the water necessarily used in placer mining. That was the water spoken of when they said they wanted the water and naturally supposed that respondents' counsel knew something of placer mining and would understand that water is necessary in such cases."

These excerpts clearly state the controlling issue, which is whether appellant, at the time of the commencement of this action, held, or was entitled to the possession of, any valid placer mining claims from which it had been wrongfully ousted. We are convinced that it did not have any such rights; that no actual discovery was made; that its alleged locations were not properly perfected; and that labor upon the locations was not done in compliance with the requirements of Rem. & Bal. Code, § 7867. Assuming, however, that appellant's original locations and labor thereon were at the time sufficient, yet we conclude from all the evidence that their claims were thereafter abandoned. It is conceded that, for more than a year prior to the commencement of this action, no work had been done on any of the alleged claims, and that no application had been made to the forestry department by appellant for permission to develop or work the same. Appellant seeks to excuse these omissions by the contention that it was ousted and prevented from doing any

work by the respondent corporation, by other defendants herein, and by certain forest reserve agents or employees who ordered it and its predecessors to leave the forest reserve, and with threats of arrest and imprisonment forbade their return. There is no competent evidence to show any ouster by respondents or any of the defendants herein, nor is there any competent proof that any other persons who thus forbade appellant or its predecessors from going upon and improving the claims was connected with the forestry department of the government, or that they had authority to interfere with appellant. The entire record indicates that appellant's predecessors attempted to locate the alleged placer mining claims and appropriate the alleged water right as a speculative venture in an effort to prevent the respondent or any other persons from appropriating, developing, improving, or using the waters of the lake and stream; that neither appellant nor any of its predecessors made an honest effort to use the water power, to develop or improve the same, or to work any of their alleged placer mining claims. It further appears that the respondent corporation, prior to the commencement of this action, made extensive surveys; that it commenced improvements for diverting, developing, and using the water power; that it obtained a permit from the government, and that prior to the trial of this action it in good faith expended approximately $1,000,000 in such surveys, improvements and development. We fail to see that appellant is in any position to complain, as it does, that the major portion of this expenditure was made after the commencement of this action. It does not appear that it made any attempt to enjoin or stop the improvements, nor is it shown that it pressed this action to an early trial. The action was commenced on November 30, 1909, but was not tried until January 26, 1911.

Appellant further contends that the trial court erred in refusing a new trial, claimed on the ground of newly discovered evidence; or rather, for the discovery of an impor-

tant witness, one Hamilton, who it is claimed had performed labor on the alleged placer claims. No continuance had been asked on account of the absence of this witness, nor had any affidavit been presented disclosing what his testimony would be if he were present. He was found within a very few days after the trial, and we conclude that sufficient diligence to locate him prior to trial has not been shown. It further appears that no affidavit of labor which it is claimed was performed by him was ever recorded as required by statute. The trial judge did not abuse his discretion in refusing a new trial.

We find no prejudicial error in the record. The judgment is affirmed.

Mount, C. J., Ellis, Fullerton, and Chadwick, JJ., concur.

[No. 10503. Department Two. December 14, 1912.]

Sidney Harris, *Appellant*, v. Jane C. Harris, *Respondent*.[1]

Divorce—Alimony—Support of Child—Jurisdiction to Modify Decree—Parties Outside State. The court granting a divorce and awarding periodical alimony for the support of a child retains jurisdiction to increase the future allowances, as to both the persons and the subject-matter, although both parties have since left the state, on service of notice on the defendant and the attorneys of record, no original process being necessary.

Appeal from an order of the superior court for King county, Gilliam, J., entered April 3, 1912, for the support of a minor, in an action for divorce. Affirmed.

Tucker & Hyland, for appellant.

Million & Houser and *George Friend*, for respondent.

Morris, J.—Appeal from an order increasing an allowance to respondent for the support of the minor child of the

[1]Reported in 128 Pac. 673.

parties. On May 31, 1910, a decree of divorce was entered in this action, providing, among other things:

"And the plaintiff be, and he hereby is, ordered and directed, until the further order of this court, to pay to the defendant, on the first day of each and every month, the sum of $16, for the support of the minor child Cecil."

No provision was made in the decree for the custody of the minor child, for the reason, doubtless, that the child was then and still is domiciled in the state of Illinois. Since the entry of this decree, both parties have become residents of the state of California. On March 20, 1912, respondent filed a motion, asking for a modification of the decree by increasing the allowance for the minor child. This motion was served personally upon appellant at his residence in California, and upon the attorneys who had appeared for him in the original action. Appellant appeared specially in response to this motion and challenged the jurisdiction of the court as to subject-matter and person. This challenge was denied, and an order entered increasing the allowance for the support of the child to $25 per month. The assignments of error submit the jurisdictional questions as raised below.

In our opinion the court below had ample jurisdiction as to both person and subject-matter. This question has been so recently before us that we do not regard it as necessary to enter upon a full discussion of the powers of the court in divorce cases where periodical alimony is provided for the support of minor children. In *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2, we said:

"The jurisdiction of the court in divorce cases, where alimony is awarded for the support of children, is a continuing one, and the jurisdiction of both the parties and the subject-matter continues so long as there is a minor child whose welfare and maintenance are provided for in the decree."

The same rule was announced in *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634, where, in addition to following the *Poland* case, it was added: "These matters, from their very nature,

invoke the equitable powers of the court, and the jurisdiction is a continuing one." It need only be added that appellant's contention, that the courts of Washington acquired no jurisdiction over his person by the service of the motion upon him in the state of California, is not well taken. Inasmuch as the court, by virtue of its original jurisdiction and its continuing decree, retained jurisdiction over both person and subject-matter, no original process was necessary to regain a jurisdiction never lost. That such a jurisdiction is retained and is not defeated by the departure from the state, is well settled. *Laing v. Rigney*, 160 U. S. 531; *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. 332, 48 L. R. A. 679; *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705; *McSherry v. McSherry*, 113 Md. 395, 77 Atl. 653, 140 Am. St. 428; *Wells v. Wells*, 209 Mass. 282, 95 N. E. 845, 35 L. R. A. (N. S.) 561.

Many cases might be cited holding with appellant, where the decree had become final. But where, as here, the decree is not final, but continuing, the original jurisdiction continues, and the court has as much power to order subsequent modifications as it had to enter a decree in the first instance. The only final feature of judgments of this character is as to each installment of alimony as it becomes due. As to these installments, the rights and liabilities of the parties become absolute and fixed at the time provided in the decree for their payment, and to this extent the judgment is a final one.

The order appealed from is affirmed.

Mount, C. J., Main, Ellis, and Fullerton, JJ., concur.

[No. 10470. Department Two. December 16, 1912.]

PETER V. CERINI *et al.*, *Appellants*, v. CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, *Respondent*.[1]

EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—SHOWING PERFORMANCE. In an action for damages for breach of a stipulation in a right of way deed to move a barn to a location "to be mutually agreed upon," oral evidence that at the time the deed was made the parties had orally agreed upon the location does not vary the terms of the writing, and it is admissible for the purpose of showing full performance of the agreement; since the writing did not contain the whole agreement of the parties.

Appeal from an order of the superior court for King county, Ronald, J., entered January 6, 1912, granting a new trial after the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Jay C. Allen, for appellants.

Geo. W. Korte and *Chas. S. Gleason*, for respondent.

MORRIS, J.—Respondent purchased a right of way across the lands of appellants. Upon this right of way was a barn which was to be moved by the railway company to another location. The case arises upon this feature of the contract, it being contended by appellants that the contract was broken in this regard. At the trial, certain evidence was offered by respondent upon its theory that the barn had been moved to a location mutually agreed upon by the parties before the deed evidencing the purchase and the contract was signed. This was rejected by the court. The trial resulted in verdict for appellants. Respondent then moved for a new trial, urging, among other things, error of the court in rejecting this evidence, which motion the court granted, and from this order plaintiffs appeal.

The deed recites:

[1]Reported in 128 Pac. 666.

"The foregoing grant is made upon the following express conditions: That the grantee herein named shall move the large stock barn now on said right of way to a suitable point on the premises of said grantors, to be mutually agreed upon by the parties hereto, and in addition to gravel the approaches to all doors of said barn."

Without setting forth the matter in detail, as the same question is presented in various ways, the railway company called its right of way agent and offered to prove by him that he and Mr. Cerini entered into a complete agreement as to the place where the barn was to be moved, at the time when negotiations for the purchase of the right of way were completed, and that thereupon he prepared the deed with the condition as set forth. Objection was made and sustained, upon the theory that the deed contained the contract of the parties; and as it recited that the place was "to be mutually agreed upon," evidence that it had already been mutually agreed upon was inadmissible as varying and contradicting the terms of a written contract; and that it must be assumed that all prior negotiations were merged in the deed.

It must, of course, be admitted that, the execution and acceptance of a deed being the final act of the parties in expressing the terms of their agreement, all prior agreements are, as a rule, merged therein, and the deed must be presumed to express the intention of the parties with reference to its subject-matter. This rule, however, as applied to deeds and other documents is a very flexible one, and there are many instances in which in actions at law parol evidence has been received where the contract which was the basis of the action was a written one. No general rule by which these exceptions can be tested can be formulated, for it may be generally said, as in *Liebke v. Methudy*, 14 Mo. App. 65, "that the courts have endeavored to adapt their rulings either way to the obvious demands of abstract justice in each particular case." A strict enforcement of this rule would prevent evidence of statements and representations used by

one party to induce another to purchase land; yet no one would contend that such evidence was not admissible, and that the law does not hold a party strictly responsible for representations, whether oral or written, which he holds out, and relying upon which another party acts. Nor, again, would it be contended that parol evidence was not admissible to explain how a contract was to be carried out, as held in *Willis v. Fernald*, 33 N. J. L. 207, or that there had been an election as to the manner of performance (*Norton v. Webb*, 35 Me. 218), or that the parties had determined upon a particular method to carry out some provision agreed upon. *Honeycut v. Strother*, 2 Ala. 135.

What was the action, and what was respondent seeking to recover? Damages for breach of the contract to move the barn to a suitable place. The gist of the action is found in the allegation of the complaint:

"That the said defendant has failed and neglected to move said barn to a place mutually agreed upon between these plaintiffs and it, said defendant, and on the contrary said defendant has taken possession of said barn and moved the same to a point which is unsuitable and at a point where said barn cannot be used, and at a point which is not suitable or satisfactory to these plaintiffs, and said moving was done without the consent or knowledge of these plaintiffs."

The moving being admitted, respondent would be deprived of any defense to these allegations, unless it could prove that it did move the barn to a place mutually agreed upon, and that said moving was done with the knowledge and consent of appellants. Neither do we think this evidence in any way contradicts or varies the condition in the deed. That condition was, to move the barn to a suitable place to be mutually agreed upon. How can it be said that the offered evidence, that the parties had agreed upon a suitable place and that the barn was moved to that place, contradicts the written stipulation? Appellants' argument is that the place was "to be mutually agreed upon;" that this language de-

manded an agreement subsequent to the execution of the deed, and that a prior agreement is not one "to be mutually agreed upon." Suppose the offered testimony related to a time subsequent to the execution of the deed. Then evidence would have to be admitted as to the location of the suitable place agreed upon, and thus parol evidence would be admitted, adding to the terms of the deed. This simply shows that, whatever might be the presumption as a matter of fact —and this too is evident from the deed itself—the written contract did not contain the whole agreement of the parties, nor fix the full measure of respondent's undertaking. It seems to us that an offer to prove that this suitable point was mutually agreed upon does no more violence to the terms of the deed when agreed upon before its execution, than subsequent thereto. In each case it supplies something in which the deed is lacking. If we give blind adherence to the words "to be," as providing for an additional agreement, when was this "to be" agreement to be entered into? One day or one year hence? And how was this suitable place to be determined? The deed is silent, and the only way it could be given any effect is to read it, as the intent and meaning of the parties, that some agreement other than the deed itself should determine this suitable point of mutual satisfaction. We therefore agree with the court below that the evidence should have been admitted, and that its refusal was error.

Respondent devoted a part of its brief to its suggestion that the contract as set forth is not capable of enforcement; that an agreement to thereafter mutually agree cannot become a binding contract until the subsequent agreement is entered into; that each party reserved to itself the privilege of determining the suitable point to which the barn could be moved, and the law could compel neither party to depart from his own suitable location and accept that chosen by the other. Whether this contract is such an one or not might prove an interesting study if we had time or disposition to go into it, but we do not think we are called upon to deter-

mine that question. The only question submitted by the appeal is the action of the court in granting a new trial for the reasons given; and for the reasons given, the order appealed from is affirmed.

Mount, C. J., Fullerton, Ellis, and Main, JJ., concur.

[No. 10652. Department Two. December 16, 1912.]

James Lamar *et al.*, *Appellants*, v. Charles Anderson, *Respondent*.[1]

Appeal—Review—Harmless Error. Error in requiring an election is harmless, where from the record it is evident that the action was properly dismissed because the contract sued on had been mutually abandoned.

Trial—Findings—Necessity. Findings are not necessary to sustain a judgment of dismissal.

Contracts—Written Contracts—Oral Rescission. Parties to a written contract may abandon it by a mutual oral agreement.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 26, 1912, dismissing an action on contract, after a trial to the court. Affirmed.

M. E. Brewer and *Jno. Mills Day*, for appellants.

James Hart and *Jay C. Allen*, for respondent.

Morris, J.—Appellants are real estate brokers at Auburn, and brought this action to recover upon a contract wherein respondent listed his lands with them for sale. The contract is the one usually employed in the case of the listing of lands for sale, and the complaint contains the usual allegations of compliance by appellants and the refusal to comply by respondent. At the conclusion of the hearing, the court below dismissed the action, and this appeal follows:

No findings were made, and we cannot say what view the lower court took of the case. Appellants state in their brief

[1]Reported in 128 Pac. 672.

that, at the conclusion of the hearing, they were required to elect whether they would ask for a judgment for commissions or for damages; and that, having elected to ask judgment for commissions, the court dismissed the action, ruling that the action for commissions had been abandoned and the case tried as one for damages. We are not disposed to spend any time in determining the correctness or incorrectness of this ruling. There being no findings, we can only read the record and determine what judgment should have been entered; and having done so, it is plain that the contract had been mutually abandoned. There is some question as to the consideration of this abandonment, whether it was $10, as claimed by respondent, or $25, as claimed by appellants. But whatever the consideration, we hold there was a mutual abandonment of the contract, and that for this reason the judgment of dismissal was rightfully entered.

Error is predicated upon the failure of the lower court to make findings. The judgment being one of dismissal, no findings were required. *Noyes v. King County*, 18 Wash. 417, 51 Pac. 1052; *Thorne v. Joy*, 15 Wash. 83, 45 Pac. 642. If appellants' contention as to the reason of the lower court's ruling is correct, we do not know what finding of fact the court could have made upon which to base its judgment, since it would appear that the ruling was upon a point of law rather than a decision of facts.

Appellants also contend that the contract between the parties, having been in writing, could only be rescinded by a written agreement. However this might be in cases where a party to a written contract required to be in writing attempts to orally withdraw from it, there can be no question but that the parties to a written contract may by mutual oral agreement abandon it.

Finding that the judgment is sustained by the evidence, it is affirmed.

Mount, C. J., Fullerton, Ellis, and Main, JJ., concur.

[No. 10429. Department Two. December 16, 1912.]

TRUE S. CLARK *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant*.[1]

HIGHWAYS—ABANDONMENT—FAILURE TO OPEN—USE BY RAILWAY. A street is opened for public use to such an extent as to prevent its abandonment by nonuser, as provided in Rem. & Bal. Code, § 5673, where an electric railroad company, by virtue of a right of way deed, went upon it and set its location stakes and constructed its railway line in the street.

SAME—LIMITATION. Under Rem. & Bal. Code, § 5673, providing for the vacation of any county road which remains unopened for public use for five years after its authorization as a public highway, the five-year period begins to run from the date of the filing of a dedicated plat, and not from the date of its execution.

SAME—NATURE OF USE. A county road is opened for public use, within the meaning of Rem. & Bal. Code, § 5673, relating to abandonment by nonuser, where the line of travel generally followed the dedicated way, although frequently in order to avoid hills and ravines, it departed from the road for short distances and again entered it.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 13, 1912, in favor of the plaintiffs, in an action for an injunction. Reversed.

James E. Bradford and *H. D. Hughes*, for appellant.

Alexander & Bundy, for respondents.

MORRIS, J.—It is sought in this suit to enjoin the city from occupying territory in front of respondents' lots as a public street, upon the theory of a vacation by nonuser, as set forth in § 5673, Rem. & Bal. Code, as construed in *Murphy v. King County*, 45 Wash. 587, 88 Pac. 1115. This statute in effect is that any county road or part thereof which remains unopened for public use for five years after its authorization as a public highway is vacated.

Counsel for the city present a strong argument to the

[1]Reported in 128 Pac. 670.

effect that this section should be limited to strictly county roads, and that it has no application to streets in platted additions to cities, lying within the county, under §§ 5654, 5669, 5671, 5774, and 7848, Rem. & Bal. Code. It will, however, not be necessary for us to enter upon a discussion of this point, or to indicate a holding thereon, as such a ruling is not necessary to the decision of the appeal.

The essential facts are these: On September 24, 1891, Charles Waters filed in the King county auditor's office a plat of Rainier Beach. This addition is situate upon the western shore of Lake Washington, and at the time of its dedication was between the municipal boundaries of Seattle and Renton. On September 12, 1897, the southern boundary of Seattle was extended so as to include this plat within the present city. The plat was in the usual form, including within its territory, blocks, lots, streets, and alleys. Respondents became the owners of lots 6 and 7, in block 35, on October 10, 1906. Running through this entire plat, along the lake shore, and following as a rule the meander line, is a street named Rainier avenue, upon which respondents' lots abut. The land at this point is a steep hillside, so that the street as platted between respondents' lots and the lake stands on an angle of about 45 degrees. Between the street and the lake there is a small level piece of upland. It is admitted that, so far, at least, as that portion of the street abutting upon block 35 and its immediate neighborhood is concerned, the street has never been graded nor made use of for travel by vehicles of any description.

On June 16, 1891, the territory in question being then within the jurisdiction of the county commissioners, a franchise was granted to extend the street railway line then on Rainier avenue west of this addition, in a general southeasterly direction over the county highway to Renton. This plat was dedicated June 18th, 1891, and filed September 24, 1891. It recites that the streets, avenues and alleys thereon shown are dedicated to public use, "save and except in so far as

may be affected by the right of way granted to the Rainier Avenue Electric Railway Company, by deed of even date herewith." This right of way deed is not before us, and we only have such a knowledge of its terms as is referred to in this dedication. Rainier avenue is the only highway running in a general southeasterly direction to Renton from the point whence under the franchise the railway was to be extended. In addition to this fact, we think the recital of the plat is a clear indication that it was upon this avenue that it was contemplated the line would be built through this addition.

Nothing seems to have been done under this franchise to extend the railway, nor to open this avenue for general public travel, until February, 1896, when the engineers of the railway company made their location survey and set the stakes for the extension of the line. The actual building of the line followed in "midsummer" of the same year. It seems to us this is the decisive fact in this case, and that, when the railway company went upon this street in February, 1896, and set its location stakes, and in the following summer actually constructed its line, it was an opening of the street for public use within five years from its authorization as a public street. We think that counsel for the city unintentionally misled the lower court in this matter, and thus caused the court to hold that the street was not opened within five years. When the evidence as to the building of the street railway line in "midsummer" of 1896 was given, the court immediately asked the date of filing of the plat, and the answer was given "June, 1891." This was incorrect. The plat was dedicated in June, 1891, but it was not filed until September 24, 1891, and it is from this latter date that the five years must begin to run, as it could only be upon the filing for public record that the public could assert any rights in these streets as public highways. Midsummer of 1896 might not be within five years from "June, 1891," but it will hardly be doubted that it would be within five years from September 24, 1891;

and had the proper filing date been given the court, it might have been so held.

Some support for their position is claimed by respondents from the fact that, in front of their lots, the railway line is outside of the street as platted. The railway line is in the street as it abuts upon block 35, opposite lots 1, 2, 3, and nearly all of lot 4. Approaching lot 5, it runs outside, avoiding the steep hillside, and on to the level strip along the lake shore. Passing respondents' lots, the line runs on a curve from seven to fifteen feet outside of the street, and again enters the street, at the next street intersection. It appears that, when the railway line was built, it was sought to build it as quickly and at as small cost as possible. Having this in view, the line, although generally in the street, frequently in order to avoid hills, bluffs, ravines and other topographical obstructions, leaves the street and proceeds along the line of least resistance for varying short distances, when it again enters the street. It cannot be held that, because of this fact, the street is open only along that part of it upon which the railway line is actually laid. We think it is generally held, in construing like statutes where the line of travel, in order to avoid hills, ravines and like topographical obstructions in the authorized way, leaves it for the purpose of going around the obstacle and, when passed, again enters the authorized way that this is as much an opening and public use of the untraveled portions of the road as of that part actually used. *City of Topeka v. Russam*, 30 Kan. 550, 2 Pac. 669; *O'Dea v. State*, 16 Neb. 241, 20 N. W. 299; *Konkel v. Town of Pella*, 122 Wis. 143, 99 N. W. 453; *Maire v. Kruse*, 85 Wis. 302, 55 N. W. 389, 26 L. R. A. 449; *Shanline v. Wiltsie*, 70 Kan. 177, 78 Pac. 436; *Stickel v. Stoddard*, 28 Kan. 715; *Wilson v. Janes*, 29 Kan. 233; *Baker v. Runnels*, 12 Me. 235; *Wiley v. Town of Brimfield*, 59 Ill. 306; *Webb v. Board of Com'rs of Butler County*, 52 Kan. 375, 34 Pac. 973.

We therefore hold that Rainier avenue was opened for public use within five years from its authorization, and that for this reason the injunction was improperly granted, and to that extent the judgment is reversed. There is another issue between the parties seemingly involved in this suit upon which no evidence was given under the ruling appealed from, as to which it is stipulated that, in the event of this reversal, the cause shall be remanded for further proceedings. Because of the stipulation, it will be so ordered.

MOUNT, C. J., FULLERTON, ELLIS, and MAIN, JJ., concur.

[No. 10610. Department Two. December 16, 1912.]

THE STATE OF WASHINGTON, *Appellant*, v. SNOHOMISH COUNTY *et al.*, *Respondents*.[1]

TAXATION—PUBLIC PROPERTY—ACQUISITION BEFORE LEVY. Under principles of public policy and Const., art. 7, § 2, and Rem. & Bal. Code, § 9098, exempting state property from taxation, lands purchased by the state in the months of May and August, cannot be subjected to the taxes levied for that year, in view of the fact that the levy of the tax cannot be made until October; since the development of liability for taxes was arrested the moment public ownership attached.

TAXATION—LIEN ON LAND—RELATION—NECESSITY OF LEVY. Rem. & Bal. Code, § 9235, making the lien for taxes on real estate commence by relation on March 1 of the year in which they were levied, creates only an incipient or inchoate lien to become complete only on the making of a valid levy.

TAXATION—LIEN—ACQUISITION OF LAND BY STATE. A tax certificate upon land purchased by the state constitutes a mere cloud and not a lien, in view of the fact that there is no statutory authority for enforcing the lien against the state.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered April 18, 1912, dismissing an action to cancel tax certificates, upon sustaining a demurrer to the complaint. Reversed.

[1]Reported in 128 Pac. 667.

The Attorney General and *S. H. Kelleran*, for appellant.
Ralph C. Bell, for respondent.

Ellis, J.—This action was brought by the state of Washington for the cancellation of certain tax certificates upon, and to quiet its title to, lands purchased by it as a site for the Washington state reformatory. The complaint alleges, in substance, that the state purchased a quarter section of land in Snohomish county on May 8, 1907, and two other quarter sections on August 9, 1907; that, at all times since the purchase, the state has been in possession of these lands, using them for the purposes of the reformatory, and that on July 1, 1909, the county treasurer of Snohomish county issued severally three certificates of delinquency to the defendant Fred Everett, for the delinquent taxes against each quarter section for the years 1907 and 1908. The defendant Snohomish county interposed a demurrer to the complaint. By stipulation it was agreed that the complaint stated a cause of action in relation to the taxes for the year 1908, and that the demurrer should be treated as directed to the complaint only as referred to the taxes for the year 1907. Upon this stipulation, the demurrer was sustained. The plaintiff elected to stand upon its complaint, and the cause was dismissed. The state appealed.

The single question for our determination is this: Can real estate, in private ownership on March 1, 1907, but in public ownership when the taxes for that year were levied, be subjected to the payment of such taxes? It is a general rule, grounded in public policy, that since the power of taxation is a necessary attribute of sovereignty, the general tax laws of the state are presumed to operate upon private, not public, property, in the absence of a clear intention to the contrary. It is declared by the supreme court of the United States, in *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 173, 174, upon copious authority, that:

"General tax acts of a state are never, without the clearest words, held to include its own property, or that of its municipal corporations, although not in terms exempted from taxation. *Buckley v. Osburn*, 8 Ohio 180, 187; *Piper v. Singer*, 4 S. & R. 354; *Directors of the Poor v. School Directors*, 42 Penn. St. 21; *People v. Doe*, 36 California, 220; *Worcester County v. Worcester*, 116 Mass. 193; *Trustees of Public Schools v. Trenton*, 3 Stew. (N. J.) 618, 667; *Rochester v. Rush*, 80 N. Y. 302; *State v. Hartford*, 50 Conn. 89."

See, also, *Gachet v. New Orleans*, 52 La. Ann. 813, 27 South. 348; 1 Desty, Taxation, p. 48.

But we are not relegated solely to this general principle. It is the public policy of this state, as declared both by constitutional provision and by statutory enactment, that property belonging to the nation, state, any school district, county or municipal corporation, shall be exempt from taxation. Const., art. 7, § 2; Rem. & Bal. Code, § 9098. This being premised, let us examine the statute prescribing the lien for taxes in the light of the general process of taxation, in order to determine whether, either expressly or by implication, the taxes for 1907 ever became a lien upon the property in question. The statute declaring the lien is as follows:

"The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday of February of the succeeding year. The taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed, from and after the date upon which such assessment is made, and no sale or transfer of either real or personal property shall in any way affect the lien for such taxes upon such property." Rem. & Bal. Code, § 9235.

It will be noted that this section contemplates a levy as well as an assessment in according the lien for a real estate tax, while as to personal property taxes the word "assessment" alone is used. It will also be noted that this section does not expressly, nor by necessary implication, authorize

a lien for taxes upon state property, at any time nor upon any condition. Such a lien can, therefore, be sustained only upon the theory that it attached as a complete and subsisting lien prior to the passing of the property into public ownership. The attachment of the lien here provided for, as and from March 1, in the year of the levy, presupposes that a valid levy as affecting the particular property can and will be made by following the general taxation law developing a valid tax. As pointed out by Judge Donworth in *United States v. Pierce County*, 193 Fed. 529, an examination of the many sections of that law makes it clear that March 1 is arbitrarily taken as the beginning of the taxation year. The process of taxation is initiated on that day by the assessor then beginning the valuation of all property in the county, fixing the valuation of each property as of that date. The work of valuation necessarily covers a considerable period of time. As the next step in the process, the board of equalization, meeting in August, revises the assessment as made by the assessor. Thereafter, in September, and as another step in the process, the corporate authorities of the cities, towns, and school districts estimate the amount of revenue needed for their respective uses; and finally, as the last step in the process of taxation, the board of county commissioners and other taxing authorities in October levy the tax in specific sums. Then for the first time the concept of a tax is fully realized. The fact that the lien of the tax so created is by relation attached to specific property as of the date of the initiation of the process on March 1, cannot do away with the necessity of pursuing the whole statutory proceeding before any tax is created so as to attach as a lien as of that or any date. While the state has power for the purposes of the lien to treat the entire proceeding as having been taken at any given time, that fact does not do away with the necessity of any step in the proceeding. It seems self-evident that there can be no valid or effective lien for a tax until there is a valid tax in some specific amount.

"For, in the nature of things, no tax or assessment can exist so as to become a lien or incumbrance upon real estate until the amount thereof is ascertained and determined." Black, Tax Titles (2d ed.), § 189.

"The mere fact that the property owned on the 1st day of January became liable to taxes for that fiscal year would not avail for the purpose of taxation, without an assessment and levy. Taxes not assessed or levied can never become an effectual lien." *Bannon v. Burnes*, 39 Fed. 892, 898.

"There can be no real or effective lien until the amount of the taxes is ascertained and assessed. . . . Under such provisions of law, when the rate of taxes is fixed and the amount determined and levied, the lien for such amount relates back and attaches as of the date specified in the statute." *Territory v. Perrin*, 9 Ariz. 316, 320, 83 Pac. 361.

See, also, *Gillmor v. Dale*, 27 Utah 372, 75 Pac. 932.

Obviously the doctrine of relation presupposes a valid creation. It seems equally plain that the creation of a valid tax implies the existence of a susceptible subject of taxation at every stage of the process of such creation. Since, on general principles of public policy and by both constitutional declaration and statutory enactment, lands while held in public ownership are exempt from taxation, the land here in question was not, during any step in the proceedings creating the tax, after August 9, 1907, when it passed to the state, a susceptible subject of taxation. It follows that, at that time, the developing process of imposing the tax as a valid creation was arrested.

"The moment public ownership of the lot attached—the moment it passed from the hands of Hoxie to the city—developing liability to taxation was arrested, and in point of fact and law the state taxes for 1885 on the lot, under the assessment made in the name of the Estate of McConnell, Hoxie's vendor, never reached the point of maturity. The tax never became due, nor delinquent, and the lot could not be sold for taxes until delinquency has ensued." *Gachet v. New Orleans, supra.*

"Lands acquired for public purposes during the period between the first and final steps of taxation are exempt from

taxes levied during the year in which they are acquired." *Territory v. Perrin, supra.*

See, also, *United States v. Pierce County, Bannon v. Burnes,* and *Gillmor v. Dale, supra.*

There is no distinction in this respect between purchases by the United States and purchases by the state or a municipality for strictly public uses, as is shown by the Louisiana and Utah cases above cited. We are constrained to hold that the statute (Rem. & Bal. Code, § 9235), creating the lien as to real property taxes, makes the lien only incipient or inchoate on March 1, to become a complete and enforcible lien as of that date by relation, only upon the making of a valid levy.

We are not blind to the fact that a contrary view finds apparent support in the decisions of this court in *Klickitat Warehouse Co. v. Klickitat County,* 42 Wash. 299, 84 Pac. 860, and *Puyallup v. Lakin,* 45 Wash. 368, 88 Pac. 578. Those cases, however, construe only that part of the lien statute relating to taxes on personal property. Even assuming that this section was ever intended to apply to state property it cannot apply here. As to such taxes, the statute leaves no room for the application of the principle of relation. It fixes no specific date for the attaching of the lien. It makes the time of "assessment" the date of the lien. Personal property being easily removed or dissipated, the lien of the tax *ex necessitate* attaches as an immediate enforcible remedy at the time of assessment. This is further made manifest by the statutory provision for accelerating the time of payment of personal taxes. Sections 9249 and 9250 of Rem. & Bal. Code, empower the county treasurer to distrain for personal taxes whenever in his judgment personal property is about to be removed or dissipated, computing the tax upon the rate of levy for the previous year. The lien is thus by statute made complete, perfect, and enforcible prior to the levy for the current year. Every purchaser of personal property subsequent to the assessment, therefore, takes sub-

ject to a perfected and indestructible lien. No such provision for acceleration and computation is found as to real property taxes. The lien as to them is inchoate and unenforcible until the tax has been fully imposed by the levy for the current year. The passage of the title to the state in the interim therefore checks the ripening of the inchoate into a matured and perfect lien, makes it incapable of enforcement, in effect aborts and destroys it. The distinction seems plain. Moreover, as observed by Judge Donworth in *United States v. Pierce County, supra:*

"Further support for the position that the tax lien did not attach is found in the provision of the statute that 'as between a grantor and grantee such lien [of the taxes on real property] shall not attach until the first Monday of February of the succeeding year,' and the United States became the grantee long before that date."

Here also the state became the grantee long prior to February of the succeeding year. The cases are parallel.

Finally, that the certificates constitute a mere cloud and not a lien is further evident from the fact that neither the county nor the holder of the certificates has a remedy against the land. A lien without the incident of enforcibility *in rem* would be an anomaly, a shadow without substance. Statutory authority therefor being absent, the state cannot be involuntarily deprived of its title by judicial sale or otherwise.

"Art. 7, § 2 of the constitution, provides that the property of the United States and of the state, counties, and school districts and other municipal corporations shall be exempt from taxation. The purpose of this provision needs no argument to make it plain. It is enough to say that the whole people have said that property once acquired by a political subdivision of the state shall not be taken or its use impaired by sale to satisfy a tax. The logical conclusion from these observations is that, if property owned by a municipal corporation is not subject to a tax, property taken over by it under a statute that vests absolute title cannot be sold to satisfy a tax. To hold otherwise would defeat the

resolution of the people to preserve the character of property when once dedicated to a public use." *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68. See, also, *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; *Carter v. State*, 42 La. Ann. 927, 8 South. 836, 21 Am. St. 404. The last case cited holds that, even when by legislative enactment individuals are authorized to sue the state, that fact does not authorize the issuance of an execution for the seizure and sale of property of the state to satisfy the judgment rendered in any such suit. It also holds that a statutory provision authorizing a judicial sale of state property would be unconstitutional, as an abandonment by the legislative department of the exclusive control of the state's property and revenues vested in it by the constitution.

From whatever angle the question is viewed, the certificates for the taxes of 1907 constitute no valid and enforcible lien upon the property, which passed to the state prior to the levy of the tax. They constitute a cloud upon the state's title which should be removed. The complaint stated a cause of action. The judgment is reversed.

MOUNT, C. J., MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10617. Department Two. December 17, 1912.]

DORA SCHULTZ, *Respondent*, v. CLINTON S. SCHULTZ, *Appellant*.[1]

JUDGMENT—ENTRY—CHANGING DECISION WITHOUT NOTICE. After announcing an oral decision and causing the same to be entered upon the minutes, it is error to enter a decree contrary to the first decision, twenty-nine days later, on an *ex parte* application.

TRIAL—EVIDENCE—AFFIDAVITS. After a trial and oral decision, it is error to retry the cause upon affidavits without an opportunity to meet the same.

[1]Reported in 128 Pac. 660.

APPEAL—RECORD—EXCEPTIONS—SUFFICIENCY. Exceptions to findings of fact, filed within five days after recognition of the existence of the findings and decree, will be deemed to have been duly taken, in the absence of any objection thereto.

APPEAL—DECISION—REMAND. Where, in a divorce case, the record was unsatisfactory, and there was only a partial trial on *ex parte* affidavits, and a failure to make complete findings, the cause will be remanded for a retrial rather than a trial *de novo* on appeal.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered January 6, 1912, granting a divorce, and from an order entered March 7, 1912, denying a motion to vacate the judgment and grant a new trial Reversed.

Tom W. Holman (*U. D. Gnagey*, of counsel), for appellant.

ELLIS, J.—This is an action by Dora Schultz, as plaintiff, against her husband Clinton S. Schultz, for a decree of divorce, for temporary alimony, suit money, costs, and counsel fees, and for the custody of their two children, a daughter aged eleven years, and a son aged ten years.

The complaint charged as grounds for divorce, drunkenness, cruel treatment, personal indignities and nonsupport. The answer denied these things, made counter allegations of abuse and neglect of the defendant by the plaintiff, and alleged that the plaintiff has in her possession $1,500 in money belonging to the community, being the proceeds of the sale of their home and personal property in Duquesne, Pennsylvania; and also a sum the amount of which was unknown to the defendant, being the proceeds of the sale of a millinery business in Irondale, Washington, belonging also to the community, and which the evidence showed amounted to about $1,000. The answer also alleged that the community owned an equitable interest in two lots in Irondale, Jefferson county, Washington. The answer prayed that the divorce be denied, and that the plaintiff be required to render an ac-

counting as to the community funds alleged to be in her possession.

The cause was tried at Port Townsend, Jefferson county, on December 6 and 7, 1911. At the close of the trial, the court denied the divorce, which denial was entered on December 7, 1911, upon the minutes of the court, by the clerk. It is stated in uncontroverted affidavits of counsel for the defendant, in support of the motion to vacate the findings and decree as finally made and entered by the court, and for a new trial, that the defendant was prevented from presenting formal findings and decree in his favor for the signature of the court by the immediate departure of the trial judge from Jefferson county to hold court in Clallam county. On December 30, 1911, a motion for a judgment in favor of the plaintiff was served upon the defendant's attorney; the motion stating that it was based upon the records, files and evidence theretofore taken, and upon certain affidavits thereto attached and made a part thereof. No notice of hearing of this motion was ever at any time served upon the defendant or upon his attorney. On January 5, 1912, this motion was heard by the court at Port Angeles, Clallam county, Washington, on an *ex parte* presentation by the plaintiff, and without notice of any kind to the defendant. Upon that hearing the court, on January 6, 1912, made and filed findings of fact and conclusions of law in favor of the plaintiff, and entered a decree granting the divorce and giving to the plaintiff the custody of the two children, without making any provision allowing the defendant to see or visit them. No findings or judgment were made or entered as to the issue presented by the defendant's answer and supported by his evidence, as to the community property of the parties, nor did the decree contain any provision prohibiting either party from remarrying with a third person within six months, as provided by the statute.

On March 2, 1912, the defendant moved to vacate the decree, and for a new trial, and on March 7, 1912, within

five days after that motion, filed exceptions to the court's findings as made. The defendant's motion to vacate the decree and for a new trial was, on due notice to the plaintiff, heard and denied on June 24, 1912. The defendant gave notice of appeal on April 3, 1912.

The appellant has assigned several grounds of error, two of which must be sustained. After having announced his oral decision on December 7, 1911, denying the divorce and causing the same to be entered upon the minutes, it was error to enter a decree granting the divorce contrary to that decision some twenty-nine days later, without notice to the appellant, and upon what was in effect an *ex parte* application of the respondent.

The court also erred in considering the affidavits upon which the respondent's motion for a decree was in part based. These affidavits detailed conduct of the appellant subsequent to the trial and oral decision of the court. That decision, as announced by the court, makes it plain that the court did not then believe that the evidence adduced at the trial would warrant the granting of a decree of divorce. A careful examination of the evidence leads us to the same conclusion. It seems equally plain that the court was influenced to change his decision and grant the decree by these affidavits as to the subsequent conduct of the appellant. The fact that this conduct was reprehensible, if the affidavits are true, is immaterial. These affidavits were not evidence, and were moreover heard without notice to the appellant. That the court, at any time before entry of final decree, upon proper notice, might with propriety have opened the cause for the taking of further evidence, must be conceded, but that course was not pursued. It was, however, manifest error to re-try the cause upon affidavits and without an opportunity for hearing on the appellant's behalf. It may be suggested that, inasmuch as the appellant, on February 7, 1912, procured an order extending the time for settling the statement of facts, he thereby waived notice of the signing

of the findings of fact and conclusions of law, and that therefore his exceptions, which were filed on March 7, came too late. There was, however, no motion either in the court below or in this court, on the respondent's part, asking that these exceptions be stricken or disregarded. The respondent has made no appearance in this court, and has filed no brief on this appeal. Since the exceptions to the findings of fact were filed within five days after the positive recognition of the existence of the findings and decree by the appellant in his motion for a new trial, we are constrained to hold that, in the absence of any objection thereto, we are authorized to treat these exceptions as duly taken.

Ordinarily we would try the cause *de novo* upon the record, and direct such a decree as we might deem the evidence to warrant; but in view of the unsatisfactory state of the record, the partial trial of the cause upon *ex parte* affidavits, and the failure of the trial court to make any findings or disposition as to the property rights of the parties we think the ends of justice would best be served by a new trial.

The judgment is therefore reversed, and the cause is remanded for a new trial.

MOUNT, C. J., MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10532. Department Two. December 17, 1912.]

A. McCANN, *Respondent*, v. ALASKA LUMBER COMPANY, *Appellant*.[1]

ARBITRATION AND AWARD—REVOCATION—SUBMISSION BY COURT. Since a submission to arbitration made a rule of court cannot be revoked by one of the parties without an order of court, one of the parties cannot revoke a submission in which the award was vacated because of irregularities and the matter resubmitted by order of court.

SAME—VACATION—BIAS. Where no bias or prejudice is found, it is proper to refuse to vacate an award by arbitration.

[1]Reported in 128 Pac. 663.

Appeal from a judgment of the superior court for King county, Main, J., entered February 19, 1912, in favor of the plaintiff upon an award by arbitrators, in an action on contract. Affirmed.

Million & Houser, for appellant.

Smith & Cole, for respondent.

MOUNT, C. J.—The plaintiff brought this action to recover from defendant $1,750, alleged to be due upon the purchase price of certain shingles sold to defendant. The defendant answered admitting the purchase of the shingles, but denied that any sum remained due upon the purchase price, and alleged a counterclaim amounting to $1,500. Thereafter the parties signed a stipulation, agreeing to submit the matters in controversy to arbitration. The plaintiff selected J. L. Hillman and the defendant selected E. G. Butterfield, and it was stipulated:

"That all matters in controversy between the parties hereto shall be submitted to said arbitrators, and in case they shall be unable to agree, that then they shall select a third disinterested person to act in conjunction with them as such arbitrator, and the decision of any two thereof shall be deemed the decision of said arbitrators."

Thereafter the arbitrators procured certain books of account and papers from the parties, and proceeded to examine the same, and made an award of $1,735.93 in favor of the plaintiff. The defendant thereupon filed a motion in the cause to set aside the award, upon the grounds that the award had not been sealed and the original delivered to the plaintiff, and had not been filed with the clerk of the court, and that the arbitrators misbehaved because they had refused to permit it to be heard or to give any notice of hearing, and refused to permit defendant to introduce any evidence. This motion was granted because the award had not

been sealed and filed with the clerk. The court ordered that the case be referred back to the arbitrators, and that they set a day and allow either side to present witnesses and thereafter make another award. Thereafter the defendant by its counsel filed and served a notice upon the counsel for the plaintiff, to the effect that the defendant revoked the stipulation for arbitration and refused to be longer bound thereby. Defendant also filed a motion in the cause to set aside the arbitration agreement for the reason, among others, that the defendant had revoked the agreement and that the arbitrator selected by him was unfair. This motion was based upon affidavits. Counter affidavits were filed by the plaintiff. Upon the hearing of this motion, the court denied the same, and ordered the arbitrators to proceed with the hearing. The arbitrators afterwards heard evidence and made an award of $1,000 in favor of the plaintiff, and judgment was rendered thereon. Defendant has appealed from that judgment.

The position of appellant is that he was not bound by the stipulation to arbitrate because, prior to the award, it exercised its right to revoke the stipulation, and the court therefore erred in entering a judgment upon the award. At common law, the submission to arbitration might be revoked by one of the parties thereto at any time prior to the award. 2 Am. & Eng. Ency. Law (2d ed.), 594; 3 Cyc. 610. But where the submission is made a rule of court, it cannot be revoked even by consent of the parties without an order of the court. 2 Am. & Eng. Ency. Law (2d ed.), 597; 3 Cyc. 611, and cases there cited. In this case, after the first award had been vacated, the submission was made by order of the court, and of course could not be revoked by one of the parties without the consent of the other and of the court. It is the rule that a party is not bound when an arbitrator is biased or prejudiced, and the trial court undoubtedly had power to set aside the award upon that ground. But the

court in this case did not find any bias or prejudice, and therefore properly refused to vacate the award.

We find no error, and the judgment is therefore affirmed.

MORRIS, ELLIS, and FULLERTON, JJ., concur.

MAIN, J., took no part.

[No. 10693. Department Two. December 17, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. AXEL NESS, *alias* AXEL NIST, *Appellant*.[1]

CRIMINAL LAW—APPEAL—HARMLESS ERROR. It is not prejudicial error to refuse to strike from an information the name of defendant's confederate and his aliases, where the matter objected to was heard at the trial without objection, although the confederate was dead.

HOMICIDE—EVIDENCE OF OTHER CRIMES—MOTIVE. As evidence of another crime is admissible when it tends to establish motive, possession by defendant of a burglar's jimmy may be shown in a prosecution for manslaughter, the defendant having shot and killed an officer when commanded to halt.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 11, 1912, upon a trial and conviction of murder in the second degree. Affirmed.

Ivan Blair, for appellant.

John F. Murphy, *H. B. Butler*, and *Hugh M. Caldwell*, for respondent.

MAIN, J.—The appellant was first charged, together with one John Ford, alias Ryan, alias Loffey, by information filed in the superior court of King county, with the crime of murder in the first degree. Upon such information, a trial was subsequently had, which resulted in a verdict of guilty of murder in the second degree. Motion for a new trial being made and overruled, the plaintiff was sentenced to a term

[1]Reported in 128 Pac. 664.

in the penitentiary at Walla Walla, from which sentence and judgment overruling the motion for a new trial, an appeal was taken, and this court, in *State v. Nist*, 66 Wash. 55, 118 Pac. 920, reversed the case and remanded the same for a new trial. After the cause had been remanded for a new trial, the appellant was charged by information with the crime of murder in the second degree. Omitting the formal parts, the information reads as follows:

"That said Axel Ness alias Axel Nist and John Ford alias Ryan alias Loffey, and each of them, in the county of King, state of Washington, on the 23rd day of February, 1911, did wilfully, unlawfully, feloniously and with a design to effect the death of one Judson P. Davis, shoot at, towards and into the body of said Judson P. Davis with certain deadly weapons, to wit: revolver-pistols, then and there loaded with powder and bullet, and then and there held by them, the said Axel Ness alias Axel Nist and John Ford alias Ryan alias Loffey, and each of them, thereby mortally wounding said Judson P. Davis, of which said mortal wound said Judson P. Davis then and there died."

On March 8, 1912, when this information was filed, John Ford, one of the persons named therein, had been dead for more than twelve months. The appellant moved to quash the information because of the fact that Ford was joined as a party, or in lieu thereof to strike from the information all reference to him, which motions were overruled. Subsequently the cause came on for trial, and the jury returned a verdict finding the appellant guilty of manslaughter. Motion for a new trial was seasonably made and overruled, and the appellant sentenced to the state penitentiary at Walla Walla, from which judgment and sentence the case is brought here on appeal.

The evidence in the case discloses that, on the evening of February 23, 1911, two policemen of the city of Seattle, in civilian dress, Judson P. Davis and H. C. Smith, were on Boylston avenue in the city of Seattle, under orders from the chief of police to patrol that neighborhood. While

standing on the corner of Boylston avenue and Olive street, they were passed by two persons whom they for some reason took to be suspicious characters, and thereupon followed them. The two persons were the appellant and Ford. After proceeding north on Boylston avenue about two blocks, appellant and Ford turned out into the street. Smith, one of the officers, called to them to halt. Immediately they wheeled about and one of them, speaking in a voice which suggested a Scandinavian accent, a characteristic of the speech of the appellant, called "Hands up, hands up, don't move an inch." The officers obeyed the command, but drew their weapons simultaneously. Either appellant or Ford or both of them then fired upon the officers and a desperate fight ensued, in which Davis, one of the officers, was killed and Ford was mortally wounded, dying a day or two later. The appellant was wounded in the thigh and escaped, and was found shortly afterwards in a pit about two blocks from the scene of the shooting in an apparently unconscious or dazed condition. A burglar's jimmy was found within a few inches of his left hand, which tool it appears from the evidence had been in possession of the appellant at the time of the shooting. This instrument is one used for the purpose of prying open doors, windows, boxes, etc. Upon the trial, the burglar's jimmy was, by the state, offered in evidence as an exhibit, and was received over the objection of the appellant.

The first error urged upon this appeal is that the court erred in overruling the motion to quash the information, or in lieu thereof to strike from the information the words "John Ford, alias Ryan, alias Loffey," for the reason that the use of these words cast upon the appellant an unjust opprobrium and was prejudicial to his legal rights. The facts as alleged in the information, including the matter objected to by the motion to quash and to strike, were proven upon the trial without objection. They were such facts as would have appeared in the evidence, even though they had not been set out in the information. The appellant's rights

were not prejudiced by the fact that he was jointly charged in the information with his confederate in crime. Nor did the use of these words tend in any manner to the prejudice of the substantial rights of the appellant upon the trial on the merits. The trial court ruled correctly on the motions directed against the information.

The second ground of error urged is that the court erred in admitting in evidence the burglar's jimmy; and it is contended that, inasmuch as under the statutes of this state the possession of a burglar's jimmy under the circumstances here detailed would constitute a crime, the introduction of the burglar's jimmy in evidence would be proof of a separate and distinct crime. The general rule of evidence applicable to criminal trials is well settled, to the effect that the state cannot prove against a defendant any crime not alleged in the information or indictment, either as a foundation for separate punishment or as aiding the proofs that he is guilty of the crime charged; but there are certain well defined exceptions to this rule which are as well settled as the rule itself, and one of these exceptions is that evidence of a distinct offense, not charged in the information, may be introduced and is competent to prove the specific crime charged, when it establishes, or tends to establish, motive. 12 Cyc. 410; *People v. Woods*, 147 Cal. 265, 81 Pac. 652, 109 Am. St. 151; *State v. Kent* (*State v. Pancoast*), 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; *State v. Morgan*, 22 Utah 162, 61 Pac. 527; *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. In this case the evidence of the possession of the burglar's jimmy by the appellant at the time he and Ford were called upon by the officers to halt and the shooting occurred, would tend to establish a motive for their conduct at that time, and was properly admitted upon the trial.

Judgment affirmed.

MOUNT, C. J., FULLERTON, ELLIS, and MORRIS, JJ., concur.

[No. 10641. Department Two. December 17, 1912.]

A. PERLUS, *Appellant*, v. JOSEPH SILVER, *Respondent*.[1]

JUDGMENT—CONCLUSIVENESS—BAR—MATTERS CONCLUDED. Where disputes arose between parties to a contract, and one of them brought an action against the other for injunctive relief, damages, and general relief, the judgment is *res judicata* and a bar to another action upon the contract as to all matters in dispute that arose prior to the commencement of the first action.

COSTS—EXPENSES OF LITIGATION—RECOVERY—SUBSEQUENT ACTION. A successful litigant cannot maintain a subsequent action to recover from his losing adversary the costs and expenses of the litigation, but must resort to his statutory right to have items thereof taxed as costs in the first action.

Appeal from a judgment of the superior court for King county, Gay, J. entered February 27, 1912, dismissing an action on contract. Affirmed.

J. H. Allen, for appellant.

Walter S. Fulton and *Walter Metzenbaum*, for respondent.

MAIN, J.—This is an action brought by the appellant for damages for the alleged breach of a contract, and also for damages incident to a previous action between the same parties. The answer of the respondent denies the right of the appellant to recover damages sustained in the previous action, and also contains a plea of *res adjudicata* as to all other matters pleaded in the complaint in this action.

For some time prior to December 24, 1909, the appellant was the owner and in possession of a certain wooden structure in the city of Seattle, known as number 1530, Pike Place, which structure had a street frontage of approximately thirty feet. The appellant was also in possession of the ground upon which this building stood, under a lease which by its terms expired September 1, 1910, under which

[1]Reported in 128 Pac. 661.

lease he paid to the owner of the fee a specified monthly ground rent. There existed under the building in question a basement which produced to the appellant a monthly revenue. The respondent, on December 24, 1909, being the then owner of the ground upon which the appellant's building stood, as well as the surrounding property, desired to erect a new structure thereon. The parties to this action thereupon entered into an agreement in terms as follows:

"This agreement entered into this 24th day of December, 1909, by and between Joseph Silver, party of the first part, and A. Perlus, party of the second part, witnesseth:

"Whereas the party of the second part is owner of the certain wooden structure located at Pike Place thirty feet south of Pine street, in the city of Seattle; which building stands upon the ground to which the party of the second part holds the lease until Sept. 1, 1910; and whereas the party of the first part is building a structure around and over the said wooden building belonging to the party of the second part; and whereas for the consideration hereinafter mentioned the party of the second part desires to remove any and all obstacles to the building of the said new structure, therefore the party of the second part agrees as follows for the sum of $200.00, receipt of which is hereby acknowledged. Party of the second part agrees that he will allow the party of the first part to build the said new structure according to the plans and specifications now prepared without any lien or hindrance on his part, and in said allowance party of the second part hereby agrees to permit the party of the first part to cut off whatever portion of said building that may be found necessary to remove in the building of the new structure. Party of the second part further agrees to allow the party of the first part to build around and above the party of the second part, and to do whatever may be necessary to complete the new structure. Party of the second part further agrees that upon the completion of the new structure around the wooden building he is now occupying that he will allow the party of the first part to tear down the wooden structure, and party of the first part agrees to give party of the second part a store in the said new structure for his use until September 1st, 1910, in lieu of the present

building now occupied by the party of the second part. Party of the first part agrees to perform said building operations and to tear down said wooden building with the least inconvenience possible to the party of the second part. Party of the second part agrees to allow the party of the first part to excavate under his building and to build a cellar under the first floor of the said wooden building, and to do whatever may be necessary to complete the said cellar. In witness whereof we have subscribed our names to the foregoing agreement. A. A. Perlus.
"Philip I. Schlick. Joseph Silver."

Subsequent to the execution of this contract, the respondent proceeded with the erection of a building as therein contemplated. Disputes between the parties as to their respective rights under the contract occurred from time to time, until February 23, 1910; on which date the appellant brought an action on the contract, in which he sought injunctive relief, damages for the conversion of certain lumber, and general relief. In due time the cause came on for trial, and on May 20, 1910, the court signed its findings of fact, conclusions of law, and decree therein. The present action was begun on the 19th day of October, 1910. The appellant now seeks under the contract to recover, (1) damages for delay in completing the new structure; (2) damages on account of being deprived of the use of the basement; (3) damages on account of negligence in the conduct of the building operations; and (4) damages incident to the bringing of the previous action. This cause came on for trial before the court and a jury. The appellant introduced in evidence as a part of his case the contract in question and the judgment roll in the previous action. The respondent thereupon moved for a nonsuit, for the reason that all matters which were sought to be litigated in this action growing out of the contract either were, or could have been, litigated in the previous action between the same parties, and that the items of damages claimed as incident to the previous action were in no sense recoverable. This motion was

granted by the court and judgment of dismissal entered, from which the cause is brought here on appeal.

The first question presented is whether or not the introduction in evidence of the contract and the judgment roll of the previous case showed that all matters in question here, growing out of the contract, were either in issue in the previous action or might have been raised and adjudicated therein. The dispute as to the basement arose during the month of December, 1909. The dispute as to the delay arose prior to the commencement of the previous action and long prior to the trial thereof. The negligent method of construction, if there were negligence in this regard, occurred in ample time to have been litigated in the previous action. The previous action was between the same parties and upon the same contract. All points in issue in this action could have been adjudicated in the former action. It therefore appears clear that the ruling of the superior court was right on this question. It is the settled law of this state that, in an action between the same parties, a judgment therein is *res adjudicata* as to all points in issue, and also as to all points which might have been raised and adjudicated in such action. *Sweeney v. Waterhouse & Co.*, 43 Wash. 613, 86 Pac. 946; *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515; *Krug v. Hendricks*, 54 Wash. 209, 102 Pac. 1049; *Bradley Engineering & Mach. Co. v. Muzzy*, 54 Wash. 227, 103 Pac. 37; *Olson v. Title Trust Co.*, 58 Wash. 599, 109 Pac. 49; *Thompson v. Washington Nat. Bank*, 68 Wash. 42, 122 Pac. 606, 39 L. R. A. (N. S.) 972.

The next question is as to the right of the appellant to recover in this action the costs and expenses which he sustained in the previous action. There is no common-law principle that permits a successful litigant to recover from his losing adversary the costs and expenses of the litigation; hence, if such a right exists, it must be statutory. The legislature of this state has given to the successful litigant the

right to have certain items of expense taxed as costs; but these must be taxed in the original action and not recovered by subsequent suit. There being neither common law nor statutory authority for maintaining the cause of action in the instant case for the costs and expenses of the previous litigation, the nonsuit as to this was also properly granted. 11 Cyc. 24; 5 Ency. Plead. & Prac., 108; *Lovell v. House of the Good Shepherd*, 14 Wash. 211, 44 Pac. 253; *Flanders v. Tweed*, 15 Wall. 450; *Day v. Woodworth*, 13 How. 363; *Marvin v. Prentice*, 94 N. Y. 295.

In *Lovell v. House of the Good Shepherd, supra*, this court said:

"It will not do to sustain a practice which will allow a party who successfully brings an action for the recovery of a legal right to bring a subsequent action to recover the expenses incident to the first case."

The judgment will therefore be affirmed.

MOUNT, C. J., FULLERTON, ELLIS, and MORRIS, JJ., concur.

[No. 10539. Department Two. December 18, 1912.]

R. W. GUINN *et al.*, *Respondents*, v. R. ROELOFS, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR. In an action tried to the court, it is not material whether the court used the proper measure of damages, where there was ample evidence to warrant the court's finding of damages.

FISH—FISHERY RIGHTS—LOCATIONS—DESCRIPTION. A map for a fishing location sufficiently describes the location, within Rem. & Bal. Code, § 5214, where it fixes the upstream limit so that a person would have no trouble in locating it; and it is not necessary to describe the downstream limit, which the law fixes 300 feet distant.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered February 5, 1912, upon find-

[1]Reported in 128 Pac. 653.

ings in favor of the plaintiffs, after a trial on the merits before the court, in an action to enjoin a trespass and for damages. Affirmed.

E. C. Dailey, for appellant.

William Sheller, for respondents.

Morris, J.—Respondents, claiming certain fishing locations in the Snohomish river, brought this action against appellant to restrain him from fishing within these locations, and to recover damages for the trespass. Upon the hearing, a decree was entered in respondents' favor, establishing their locations, restraining appellant from fishing therein, and fixing the damages at the sum of $50, from which decree appeal is taken.

Appellant first attacks testimony given by respondents, showing or tending to show the number of fish taken from these locations by appellant, contending that the only way respondents could prove damage would be by the value of the use of the fishing grounds for fishing purposes; and as there was no evidence of this, there was no testimony upon which to base the award of damages. The case was tried to the court without a jury. Under these circumstances we are not disposed to search the record to ascertain whether or not the court used the proper measure of damage. Whatever was the proper measure of damage, and whether the court followed it or not, there was ample testimony correctly received to warrant a finding that respondents had been damaged to the extent found.

Respondents' location maps are next attacked as being insufficient to give them any fishing rights at the location in question. Section 5214, Rem. & Bal. Code, contains the requirements for these location maps. It is provided that they "contain a plat and description of said fishing location sufficient for its ascertainment and identification on the premises." Other provisions need not be referred to. The fault

found with these maps is that they fail to show the lower or downstream limits. An examination of the map shows, as found by the lower court, that it contains all the statutory requirements. The statute describes each location as 300 feet downstream from the upper limits. It does not seem to us that the map should measure off 300 feet in order to establish the lower limits of the location. The law fixes the lower limit, and when the location map accurately shows the upper limit, it is a very simple matter to identify the location on the river. In *Muller v. Apex Fish Co.*, 57 Wash. 140, 106 Pac. 625, the map gave the township as "37" instead of "33." It was pointed out that no one could be misled by this error, because the map located the trap site off the west coast of Whidby Island, which is in township 33. In addition, it was said: "It was not claimed that the respondent was misled by this error. The map or plat upon its face seems, both by the evidence and an examination of the plat itself, amply sufficient for the ascertainment and identification of the trap site on the premises, which is all the statute requires." So here, any person taking this location map for the purpose of ascertaining the exact location of these fishing rights would have no trouble in finding them, which is all that is required. The critical searcher could only say: "It does not say how far downstream it goes." The law fixes that distance, and no one desiring to ascertain it need long remain in ignorance.

The last assignment is insufficiency of the evidence to sustain the findings. We think it is ample.

The judgment is affirmed.

Mount, C. J., Main, Ellis, and Fullerton, JJ., concur.

[No. 10518. Department One. December 18, 1912.]

BIG BEND LAND COMPANY, *Respondent*, v. SMITH HUTCHINGS, *Appellant*.[1]

VENDOR AND PURCHASER—CONTRACTS—WARRANTY—COVENANTS RUNNING WITH LAND. A contract to convey land by warranty deed does not require a deed direct from the vendor to the purchaser, but is satisfied if the vendor passed title by warranty to a third person who conveyed by warranty to the purchaser; since the covenants run with the land and may be enforced against all the covenantors.

SAME—ASSIGNEE OF VENDOR—LIABILITY. An assignee of a vendor under contract to convey and warrant to the extent of the recited consideration, is bound by the covenant, where he had notice of the rights of the vendee.

SAME—ACTION FOR INSTALLMENT—DEFENSES. In an action on an installment due on a land contract, the vendee cannot defend on the assumption that the plaintiff will not, on the last payment, offer the deed called for by the contract.

ASSIGNMENTS—OPTION TO PURCHASE LAND. The rights of the vendor under an option contract for the purchase of land may be assigned, as the principle of personal confidence is not involved, where the vendee will receive a deed impressed with the agreed upon covenants of his vendor.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered January 17, 1912, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

W. E. Southard, for appellant.

Merritt, Oswald & Merritt, for respondent.

CHADWICK, J.—On the 19th day of June, 1909, W. M. Garretson and wife executed a contract whereby they agreed to convey to Smith Hutchings, the appellant, a certain section of land in Grant county, Washington, in consideration of the sum of $12,800, to be paid, $1,500 on the delivery of

[1]Reported in 128 Pac. 652.

the contract—which sum was paid—and the balance of the purchase price to be paid as follows: $1,000 September 1, 1909; $500 October 1, 1909; $2,000 November 1, 1909, and the balance to be paid in equal installments on the first day of November in each succeeding year until 1914. Appellant defaulted in the payment due November 1, 1910, and this action is brought by the Big Bend Land Company, the respondent, to recover the amount of that payment with interest. The contract for the sale of the land provided that the vendors would, upon the full payment of the purchase price, execute, or cause to be executed and delivered to the appellant, a deed with full covenants of warranty.

Appellant defends the action, relying upon the case of *Gottschalk v. Meisenheimer*, 62 Wash. 299, 113 Pac. 765, 115 Pac. 79. In that case one Clodius held the legal title. Meisenheimer executed an option contract or executory agreement, said to be in form the same as we have here, in which he agreed to convey the land to Gottschalk with covenants of warranty. Thereafter, to serve some personal end, Meisenheimer caused Clodius to convey to one Maud Motley, afterwards Maud Meisenheimer, who undertook to forfeit the contract. We held, in a suit brought by Gottschalk to recover damages, that, having treated the whole sum as due, Maud Meisenheimer, the holder of the legal title, could not enforce a forfeiture without tendering such deed as the contract required, which was a deed with the personal covenants of Allen Meisenheimer. Meisenheimer had pleaded his contract, nonperformance on the part of Gottschalk, and the attempted forfeiture by Maud Meisenheimer, as defenses. He had kept himself out of the transaction. Had Gottschalk accepted Maud Meisenheimer's deed, he would not have had Meisenheimer's warranty. Neither Meisenheimer's name nor his warranty appeared anywhere in the chain of title. Consequently, neither the holder of the legal title nor the assignee of his contract could insist upon his vendee taking a deed from a stranger without the personal warranty con-

tracted to be given. Here Garretson conveyed by deed of general warranty to respondent, and it must convey by deed of general warranty to appellant. We do not understand that the promised covenants of Garretson must be by deed passing from Garretson to appellant direct, as implied in the argument of counsel. Such a covenant runs with the land and may be enforced against all of the covenantors in the chain of title beginning with Garretson, either jointly or severally, the only qualification or limitation being that the injured vendee shall have but one recovery. This rule is elementary. 8 Am. & Eng. Ency. Law (2d ed.), 159; 11 Cyc. 1101; Rawle, Covenants (5th ed.), 214; 4 Kent, Commentaries (14th ed.), 472; Maupin, Marketable Title, § 159.

It is contended, however, that, if appellant is compelled to accept a deed from respondent, his recovery upon a breach of covenant would be limited to the consideration expressed in the deed from Garretson to respondent, which is $6,000; whereas his contract calls for a deed in consideration of $12,000, thus permitting his vendor and immediate grantor to work an involuntary limitation of the amount of a possible recovery. Without deciding what the rule might be in this or in any other case, but accepting appellant's theory of the law as correct, we think that he has misconceived his position. The assignee of the vendor under an executory contract of sale can take no greater right, and is therefore subject to the same liability as his assignor. 39 Cyc. 1664. The possession of the vendee, or the record of the contract, is notice of the rights of the vendee, and the liability of the vendor. The right of the vendee to strict compliance cannot be limited by any agreement or conveyance between a grantor and a grantee, with notice, pending the performance of the contract. Especially is this so here, for the respondent by taking the assignment of the contract is bound to convey and warrant to the extent of the consideration recited in the contract, which is $12,000. In

other words, the vendee is entitled to the deed his contract calls for.

The case must be affirmed for another reason. Appellant has all the rights he ever had and more, and cannot complain. This action was brought to recover a payment due, and not to enforce a forfeiture. The contract is still extant, and the form of the deed to be given can only be questioned when appellant has performed, or judgments have been taken against him for the several payments due, and a deed tendered. This respondent is not bound to offer before the last payment, or when the judgment is taken on the last note. *Reese v. Westfield*, 56 Wash. 415, 105 Pac. 837, 28 L. R. A. (N. S.) 956. Appellant cannot now assume that respondent will not offer a deed which does not comply with the contract.

We have passed without discussion the suggestion made by counsel that an option contract for the purchase of land cannot be assigned. That it may be done seems to be well established.

"The vendor, by having executed a contract of sale or bond for title, does not deprive himself of the right to convey the fee and thus entitle the grantee to all of his rights in the land subject to the contract. And a vendor has a right to assign his rights under the contract so as to entitle the assignee to enforce the same, at least in the absence of a covenant or stipulation to the contrary. The assignment may be by way of security." 39 Cyc. 1663.

Appellant cites the case of *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, to the effect that, where liabilities, and especially those arising out of personal confidence, are coupled with a contract, it cannot be transferred or assigned. The principle just stated is neither involved nor abused for if appellant finally takes the deed of respondent, he will take in law all that he contracted for; that is, a deed impressed with the covenants of his vendor, Garretson.

The judgment of the lower court is affirmed.

MOUNT, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 10601. Department One. December 18, 1912.]

C. H. PETERSON, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

STREET RAILWAYS—INJURIES TO PERSONS ON TRACK—ACTIONS—INSTRUCTIONS. In an action for injuries sustained in a collision between a vehicle and a street car, an instruction that it was the duty of the motorman, when it became apparent to him that the plaintiff was about to cross the track, to use every care within his power to avoid a collision, is not prejudicially erroneous, where by other instructions the defendant was held to the rule of reasonable care.

SAME. In such a case, it is not error to refuse to instruct that the defendant was not required to give a warning of the car's approach, where there was evidence that the car was going at a rate of speed which increased the hazards.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $15,250, for a fracture of the hip joint, reduced by the trial court to $10,250, is still excessive, unless $2,500 is remitted, where there was considerable doubt and speculation as to the character of the injuries, the plaintiff walked six or eight blocks and back to see a physician six days after the accident, and there was no evidence that his earning capacity had been impaired.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 10, 1912, upon the verdict of a jury rendered in favor of the plaintiff for $10,250, for personal injuries sustained in a collision with a street car. Reversed, unless $2,500 is remitted.

James B. Howe and *H. S. Elliott*, for appellant.

Walter S. Fulton, for respondent.

CHADWICK, J.—Respondent Peterson was injured in a collision between a wagon he was driving across the track of the appellant company and one of its electric cars. From a verdict in favor of respondent, this appeal is prosecuted.

[1]Reported in 128 Pac. 650.

Errors are assigned in the giving and refusing to give instructions, and it is insisted that the judgment, even as reduced by the court, is still excessive. We have examined the instructions of the court with some care, and we are of the opinion that, taken as a whole, and in the light of the testimony, they fairly state the law of the case, and we will not discuss any of them except the following.

The court said:

"If, under all the circumstances, the motorman was justified in presuming, as a reasonably careful motorman, that this vehicle was going to continue to be driven in the direction in which it was going, and not turn across the street, then it was not necessary for him to take any unusual precautions to stop his car until it became apparent to him that he was about to cross the track of the company, *and when that became apparent to him, then it was his duty to exercise every care within his power to avoid a collision.*"

The italicized words are objected to and assigned as error. If these words stood alone they would probably be subject to criticism, but we must assume that the court intended, and the jury understood, that the words "every care within his power" had reference to such care as would suggest itself to a "reasonably careful motorman" "under all the circumstances." In other words, the instruction must be taken as a whole; and when so taken, we are unable to agree with the contention of the appellant. Furthermore, the court had said that it was the duty of the motorman "to exercise care whenever an accident becomes imminent;" "as soon as it became apparent that the driver of the vehicle was about to cross the track, it was the duty of the motorman to exercise every reasonable precaution to avoid a collision;" "it is for you to find. . . whether he used reasonable care to avoid a collision." The court also charged the jury that the motorman was justified in presuming that plaintiff's vehicle would be driven in the direction in which it was going, and generally throughout the instructions the court has held the defendant to the rule of reasonable care. There was no error

in the court's instructions, under the rule announced in many cases. *Morrison v. Seattle Elec. Co.*, 63 Wash. 531, 115 Pac. 1076; *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25, 29 L. R. A. (N. S.) 481; *Coffer v. Erickson*, 61 Wash. 559, 112 Pac. 643; *Edwards v. Seattle, Renton etc. R. Co.*, 62 Wash. 77, 113 Pac. 563; *Beseloff v. Strandberg*, 62 Wash. 36, 113 Pac. 250; *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351; *Scherrer v. Seattle*, 52 Wash. 4, 100 Pac. 144; *Leland v. Chehalis Lumber Co.*, 68 Wash. 632, 123 Pac. 1086.

Defendant requested the following instructions:

"The plaintiff complains in his complaint, gentlemen of the jury, as one of the grounds of negligence alleged against the defendant, that no proper warning was given of the approaching car. Under the circumstances of this case I instruct you that the law does not require the defendant to give warning of cars' approach, I therefore instruct you to entirely disregard the question of whether or not the gong was sounded or other warning was given by the motorman of the car which collided with the plaintiff's wagon, in arriving at your verdict."

It might be that, properly qualified, this instruction could have been given with propriety; that is to say, if the jury had been told that, if they found that the car was going at a reasonable rate of speed or at a rate not exceeding twelve miles an hour, as provided in the ordinances of the city, it would have been proper enough; but there is testimony in the case, and it must have been considered and believed by the jury, that the car was going at an unreasonable rate of speed. If a motorman assumes to drive his car at an excessive speed, he cannot be excused from his duty to ring the bell and give such warning as is commensurate with increased hazard, for it is the measure of due care. There was no error in refusing to give the requested instruction. We are satisfied that the verdict should not be set aside because of error in law.

Plaintiff was painfully injured at the time of the accident. He has offered testimony tending to show that his hip was broken; that he was laid up for a considerable time and can now go about only on crutches, although he admits on cross-examination that he attends to customers at his place of business, and can walk about or across the room without crutches. A peculiar feature of this case is that the medical men who testified in plaintiff's behalf are not entirely agreed as to the character of the injury. One physician says it was a fracture of the acetabulum, which is the cavity or socket of the hip bone into which the head of the thigh bone or femur fits, as a ball and socket. He also says: "It seemed to us, there was a slight crepitus or roughness in the joint." He doubts "whether there was a fracture of the neck of the femur." Another physician says: "It was a fracture of the joint . . . the femur is somewhat displaced upwards . . . I think the articular surface of the bone was slightly fractured . . . it seems as though the neck of the bone has been fractured . . . there is no distinct line of fracture visible." The same witness, when recalled, said: "It looked like the rim of the acetabulum had been crushed." Another physician says: "My first impression was a fracture of the neck. It does not show a distinct line of fracture, as some fractures show, for possibly one main reason, that at the present time I believe them to be due to some hypertrophic arthritis. I believe there has been a disease of the bone before possibly, yes, hypertrophic arthritis of the bone; I believe that to have been the case possibly some time before the accident; the condition at the present time I believe to be due to this particular condition, the accident." He further said that "the present condition might be due to both the accident and to hypertrophic arthritis," and, "yes, I believe that there has been hypertrophic arthritis." The medical testimony offered on the part of appellant is to the effect that hypertrophic arthritis is indicated. Hypertrophic arthritis is thus described:

"This condition is most common in men along about middle life or old age. There is no definite organism connected with it. It is not caused by an organism connected with it. The pathology of it—there appears to be some inflammatory trouble upon the articular surface of the head of the femur, also on the articular surface lining the socket of the hip joint. This inflammatory trouble is just beneath the cartilage which lines this (showing). The inflammation being the trouble, causes a softening of the bone underlying the cartilage. This bone becomes soft and the pressure of the hip bone upon the socket in walking and using it, causes the underlying softened bone to become flattened out and irritating the cartilage covering this softened bone finally becomes ossified and forms exostosis about the joint. "Q. Forms what? A. Exostosis. That is a growth on the bone; more bone formed than is normal. The softening of the head of the bone results in the flattening of the head of the bone and softening around the cap or shaft and socket, with the accompanying laying down of new bone gradually forms new bone around the head of the femur, so that in advanced cases the socket instead of being only partially covering the head of the bone, almost completely encircles the head of the bone, thus restricting the motion of the joint. That restriction of the motion of the joint, due to laying down of cartilage and new bone, is what causes pain on attempting to move the joint."

The medical testimony was based largely upon X-ray photographs. It will be seen that these medical men, all of whom seem to be sincere and unbiased witnesses, have indulged in more or less speculation. More than this, plaintiff did not consult a physician until four days after the accident, during which time he made two or three trips on foot to his place of business. He says he limped and dragged along, and we will take it at that. He lived four or five blocks from his place of business. Six days after the accident, he walked six or eight blocks to the Cobb building to see a physician, and walked home again. There is no testimony tending to show that his earning capacity has been

impaired, or that his business is suffering because of his present condition.

The verdict was for $15,250. This the court reduced to $10,250. In *Martin v. Hill*, 66 Wash. 433, 119 Pac. 849; *Lynch v. Northern Pac. R. Co.*, 67 Wash. 113, 120 Pac. 882, and *Smith v. Seattle Elec. Co.*, 61 Wash. 175, 112 Pac. 87, we held that we would not ordinarily make a further reduction in a verdict when the trial court had made a substantial reduction; but it does seem to us the judgment in this case, considering all the evidence, is penal rather than compensatory. The fact that the trial judge reduced the judgment indicates to our minds that he was convinced that the jury was moved by passion and prejudice; and considering further the very substantial doubt as to the character of plaintiff's injuries and the extent to which they may be justly attributed to the accident, we have decided to give plaintiff the option of taking a new trial, or reducing the judgment in the sum of $2,500. If the judgment is satisfied to the extent of $2,500, within thirty days after the remittitur goes down, the judgment will be affirmed. If not, the court will retry the case.

MOUNT, C. J., GOSE, CROW, and PARKER, JJ., concur.

[No. 10904. Department One. December 18, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Marion Smith et al., Plaintiff*, v. THE SUPERIOR COURT FOR COWLITZ COUNTY, *Respondent*.[1]

APPEAL—DECISION—REVERSAL AND REMAND—MANDAMUS TO LOWER COURT. Where, in condemnation proceedings, the judgment awarded to a defendant a sum deposited in court, and upon appeal by the other defendants the judgment was reversed and the cause remanded with directions to enter an order directing payment of the money to the other defendants, the same is a final determination of the merits, and the lower court cannot refuse to enter the order on the ground of want of jurisdiction, and because the money had been withdrawn

[1]Reported in 128 Pac. 648.

by order of court prior to pendency of the appeal; and mandamus will issue to compel the lower court to enter the order as directed.

EMINENT DOMAIN—COMPENSATION—CONFLICTING CLAIMS TO FUND IN COURT—PROCEEDINGS—APPEAL. Rem. & Bal. Code, § 898, providing that, in the event of conflicting claims to property condemned, the court may direct an action to be brought to determine the same, is not exclusive where the fund had been paid into court; and where all the parties appeared as upon an intervention and there was a trial on the merits, the court had jurisdiction to inquire into all the claims, and having done so, the supreme court on appeal can direct the proper judgment to be entered.

Application filed in the supreme court December 5, 1912, for a writ of mandamus to compel the superior court for Cowlitz county, McKenney, J., to enter a judgment in relators' favor. Granted.

B. L. Hubbell, for relators.

A. L. Miller and *Chauncey L. Baxter*, for respondent.

CHADWICK, J.—When the case of *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057, was remanded, application was made to the lower court for a judgment in favor of the appellants in that case, the relators here. The court refused to enter a general judgment, or any judgment other than a judgment for accumulated costs. The material parts of the judgment appealed from follow:

"It is therefore ordered, adjudged and decreed by the court that the defendant Gruber Lumber Company is entitled to twenty-five thousand (25,000) dollars deposited with the clerk of the court, and the same is thereby awarded to it. It is further ordered that the clerk of this court is instructed to deliver the money so deposited to the defendant Gruber Lumber Company. To which the other defendants except and their exceptions allowed."

The "other defendants," so far as our present inquiry is concerned, were the present relators, the heirs of L. P. Smith, deceased. The case was heard and decided by this court upon its merits, and we directed:

"The order appealed from is reversed, and the case is remanded with instructions to enter an order directing the money to be paid to the heirs of L. P. Smith, deceased."

Relators, as parties to the former suit, have applied to this court for a writ of mandamus commanding the judge of the court below to enter a judgment in their favor.

The answer filed on behalf of the trial judge goes no further than to deny the allegation that this court directed a judgment. But we understand the real position of the respondent to be that, inasmuch as the Gruber Lumber Company has withdrawn the money under the rightful order of the court, prior to the appeal, and because relators were not parties to the original judgment of condemnation, the court is without jurisdiction to enter a judgment, and that relators, therefore, although the prevailing parties, must bring an independent action to recover the amount found to be due them.

"Upon an appeal from a judgment or order . . . . the supreme court may . . . direct the proper judgment or order to be entered." Rem. & Bal. Code, § 1737.

It would seem that the court below could not do otherwise than enter a judgment as directed by this court. Ordinarily, where a party has claimed the reward of a judgment which is reversed on appeal, a restitution is asked and it is generally allowed. But it may be that our former opinion will not warrant an order of restitution. At any rate, relators are not asking for it. But it does warrant, if indeed it does not command, a judgment. There can be no need or reason for further proceedings. The real issue between relators and the Gruber Lumber Company was the ownership of the fund deposited in court for the claimants in the condemnation proceeding. That has been adjudged and the judgment affirmed. Our order reversing the lower court was a final judgment. It is only where further proceedings are directed that it is not.

"Where there is a judgment of reversal completely putting an end to the controversy by special directions or instructions, it is, as a general rule, to be regarded as final in the strictest sense of the term." Elliott, Appellate Procedure, § 585.

Our statute is declaratory of the general powers which are inherent in all courts of last resort.

"Where a cause is reversed and remanded by the appellate court, with directions as to the further proceedings of the trial court, 'it is out of the power of the lower court to open the cause and have a new trial.' *Chouteau v. Allen*, 74 Mo. 56. It must, and can only, proceed to carry into execution the mandate of the superior court. *State ex rel. Dixon v. Givan*, 75 Mo. 516. Any other rule would break down all authority of and respect for the appellate courts. As said by Sherwood, J., *supra:* 'This court would frequently be shorn of its lawful and customary authority, if a plaintiff, successful in the lower court, and unsuccessful here, could thus defeat our legitimate demands.' " *Connor v. Pope*, 23 Mo. App. 344.

The test question is, Has the litigation between the parties on the merits of the case terminated? The words of the supreme court of the United States, in *Mower v. Fletcher*, 114 U. S. 127, are singularly apt. In that case a final judgment is described as one which terminates the litigation between the parties on the merits of the case.

"So that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Bostwick v. Brinkerhoff*, 106 U. S. 3, and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the supreme court which has been rendered into execution. Nothing is left to the judicial discretion of the court below."

Our statute provides that the court may, in the event of conflicting claims to the property, direct that an action be brought, and "the conflicting claims . . . be determined according to law." Rem. & Bal. Code, § 898. But where the fund has been paid into court, we do not understand the procedure there provided is exclusive. The lower court had jurisdiction of the subject-matter and of the parties, all of whom petitioned the court to award the fund. The parties claimant appeared as upon an intervention. The proceeding was in effect a trial upon the merits before the court without a jury. This the parties could consent to, although either of them might have insisted at the time upon an independent action. In other words, the statute does not in any way change the original power of the court to direct conflicting claimants to a fund then under its jurisdiction to litigate the controversy in some formal manner. In *Chicago & N. W. R. Co. v. Garrett*, 239 Ill. 297, 87 N. E. 1009, 130 Am. St. 229, it was insisted that a court in a condemnation proceeding exercised only statutory powers, and had no discretion to inquire into the rights of conflicting claimants except as provided by statute. It was held that the court had jurisdiction to inquire into all claims of interest in the property.

The court having had jurisdiction to try the merits of the controversy and having done so, and there being nothing required of it except to change the form of the judgment previously entered, so that it will recite that relators instead of the Gruber Lumber Company are the owners of the fund, it follows that there is nothing for the court to do except to enter a judgment as directed, so that execution may issue.

The writ will issue.

MOUNT, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 10455. Department One. December 18, 1912.]

ALASKA STEAMSHIP COMPANY, *Appellant*, v. PACIFIC COAST GYPSUM COMPANY, *Respondent*.[1]

INDEMNITY—CONTRACT TO FURNISH APPLIANCES—DEFECTIVE APPLIANCES—DAMAGES PAID. Where a transportation company was compelled to compensate employees injured by reason of a defective hoisting appliance belonging to a shipper and which the shipper had supplied under a contract with the transportation company to furnish the same, the transportation company may recover over from the shipper for the sums paid out, if it received and used the appliances without notice of the defect.

SAME—ACTION AGAINST INDEMNITOR—EVIDENCE—QUESTION FOR JURY. In such a case, whether the transportation company had notice of the defect, or acquiesced in the use of the defective appliance, is for the jury, where it appears that it made use of the same only at intervals of two to six weeks apart, that some weeks previous it had notice of a worn and defective condition of a tripping device which caused danger by premature dumping, but on the morning in question it had been used several hours without accident and it was at all times in the possession and control of the shipper.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 18, 1911, upon granting a nonsuit, dismissing an action for contribution. Reversed.

Bogle, Graves, Merritt & Bogle and *Huffer, Hayden & Hamilton*, for appellant.

John P. Hartman and *Hayden & Langhorne*, for respondent.

PARKER, J.—The Alaska Steamship Company brought this action in the superior court for Pierce county, to recover over the sums it was required to pay in settlement of damages for personal injuries resulting to two longshoremen, its employees, from a defective hoisting appliance be-

[1]Reported in 128 Pac. 654.

longing to the defendant and used in unloading gypsum rock from one of the plaintiff's ships at the defendant's wharf and plant in Tacoma. The cause proceeded to trial before the court and a jury, when at the close of the evidence introduced in behalf of plaintiff, counsel for the defendant moved the court as follows:

"The defendant moves the court to grant a nonsuit in this case upon the ground and for the reason that the plaintiff has failed to make a case sufficient to submit for the consideration of the jury.

"The particular ground of the motion is that, under the evidence in this case, both the Alaska Steamship Company and the Pacific Coast Gypsum Company were joint wrongdoers, and as between joint wrongdoers no right of contribution exists.

"That the evidence plainly shows that the Alaska Steamship Company had notice of the condition the hook was in, and that if they did not have actual notice, a reasonably careful inspection would have disclosed the condition of the hook, and that the Alaska Steamship Company could not, knowing the hook was in a defective condition, use it to the injury of their men and then attempt to subject the Pacific Coast Gypsum Company to a suit for damages."

We quote this motion in full, to the end that the theory of counsel's contention may be clearly before us. This motion was granted by the court, and judgment entered accordingly. From this disposition of the cause, the plaintiff has appealed.

Appellant is a corporation engaged in the transportation business between Puget Sound and Alaska ports. Respondent is a corporation engaged in the business of manufacturing gypsum, and for that purpose maintains a plant and wharf in Tacoma, procuring gypsum rock therefor from its mine in Alaska. At its wharf in Tacoma, respondent maintains hoisting gear, consisting of a derrick with cables, buckets equipped with tripping appliance, and an electric motor for operating the same, which it uses in discharging

cargo from the holds of ships. On April 5, 1909, appellant entered into a contract with respondent for the transportation of gypsum rock from its mine in Alaska to its wharf in Tacoma. This contract is in the form of a letter from appellant to the respondent, and an acceptance of the terms thereof, indorsed thereon by respondent. The provisions of this contract which we are here required to notice are as follows:

"It being understood and agreed, in connection with delivery of cargo at Tacoma that you will from date this agreement goes into effect, furnish necessary hoisting gear to work cargo from one hatch of steamer, . . . and take cargo from us as fast as we can deliver it. It is also understood and agreed, in connection with delivery of cargo at Tacoma, that 'taking cargo from us as fast as we can deliver it' means as fast as we can shovel into buckets in hatches from which you are hoisting cargo with your gear."

Appellant proceeded under this contract to transport gypsum rock, its ships arriving at respondent's wharf in Tacoma at somewhat irregular times, which were from two to six weeks apart. The ships were discharged in the manner agreed upon, respondent's hoisting gear, buckets, tripping appliance, and electric motor being used therefor and operated entirely by respondent's own servants, excepting that the buckets were filled while in the hold of the ship and the hook on the end of the hoisting cable attached to the buckets by the appellant's employees just before hoisting the buckets out of the hold. The hoisting gear was at all times in the possession and control of respondent, it being the owner thereof, during the intervals occurring between the discharging of appellant's ships, and even while the ships were being discharged appellant had nothing to do with the hoisting gear save to fill the buckets and attach the hook to them for hoisting.

On February 28, 1910, appellant's steamship Olympia was being discharged of a shipment of gypsum rock at re-

spondent's wharf. While one of the buckets was being hoisted, filled with gypsum rock, it was prematurely dumped on account of the worn and defective condition of the tripping appliance attached to the hook, and the rock thereby caused to fall back into the hold of the ship, upon and seriously injuring two of appellant's employees who were there engaged in filling the buckets. Appellant was required to compensate these employees on account of the injuries thus suffered by them. While appellant compensated its injured employees without judgment being rendered against it therefor, no question is here made as to its liability to them, nor as to the amount thereof. It is to recover from respondent the sums so paid by appellant to its injured employees that this action was brought.

Counsel for respondent rest their claim of exemption from liability to appellant upon the general rule that there is no right of contribution between joint tort feasors; while counsel for appellant insist that the evidence introduced in its behalf upon the trial was sufficient to require submission to the jury of the question whether appellant was a joint wrongdoer with respondent as between themselves, though they were admittedly such in so far as the rights of appellant's injured employees are concerned. These were the only questions involved in respondent's motion for nonsuit and the trial court's decision thereon, and our present field of inquiry is not extended by the contentions here made.

The general rule of nonliability for contribution and indemnity as between joint wrongdoers is easy of statement, and rests upon the soundest principles of public policy. But the exception to this general rule, or rather the question of when the joint wrongdoers are not jointly in the wrong as between themselves, yet are such in the eyes of the law as to third parties, is often a problem of difficult solution. In 1 Cooley on Torts (3d ed.), p. 254, that learned author observes:

"As under the rules already laid down the party wronged may, at his election, compel any one of the parties chargeable with the act, or any number less than the whole, to compensate him for the injury, it becomes a consideration of the highest importance to the person or persons thus singled out and compelled to bear the loss, whether the others who were equally liable may be compelled to contribute for his relief. On this subject there is a general rule, and there are also some very important exceptions. The general rule may be found expressed in the maxim that no man can make his own misconduct the ground for an action in his own favor. If he suffers because of his own wrongdoing, the law will not relieve him. The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it.

"But there are some exceptions to the general rule which rest upon reasons at least as forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrongdoers to the injured party, yet as between themselves some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete. There are many such cases where the wrongs are unintentional, or where the party, by reason of some relation, is made chargeable with the conduct of others."

And at page 258, referring to the attempted general statements of the rule of the exceptions, he further observes:

"An attempt has been made in some cases to lay down a general rule by which it may be determined in every case whether the party is or is not entitled to contribution. Thus, in Ohio, the judicial conclusion is, that 'the common sense rule and the legal rule are the same, namely, that when parties think they are doing a legal and proper act, contribution will be had; but when the parties are conscious of doing a wrong, courts will not interfere.'

"This statement is a little inaccurate, in that it denies redress in the cases only in which parties are conscious of wrongdoing. There are many cases in which the absence of consciousness of wrong could not excuse a man either in law or morals. An English case states the rule more concisely as follows: 'The rule that the wrongdoers cannot have redress or contribution against each other is confined to cases

where the person seeking redress must be presumed to have known that he was doing an unlawful act.' If he knew the act was illegal, or if the circumstances were such as to render ignorance of the illegality inexcusable, then he will be left by the law where his wrongful action has placed him."

In *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 327, Justice White, speaking for the court, quoted approvingly from *Lowell v. Boston & Lowell R. Co.*, 23 Pick. 24, 32, 34 Am. Dec. 33, as follows:

"Our law, however, does not in every case disallow an action, by one wrongdoer against another, to recover damages incurred in consequence of their joint offence. The rule is, *in pari delicto potoir est conditio defendentis.* If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offence. In respect to offences, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."

These general statements of the law suggest that we first determine the respective duties owing by each of the parties to the other under the contract, relative to the safety of the hoisting appliance furnished and used in discharging the gypsum rock from the hold of appellant's steamship Olympia. It is elementary law that appellant was obligated to furnish its employees a reasonably safe place in which to work; and that respondent was obligated under its contract with appellant to furnish the hoisting appliance in such condition of repair that it would not, while in operation, render the working place of appellant's employees other than reasonably safe, seems to us quite clear; especially in view of the fact that the respondent had entire charge and control of such appliance, excepting only the control which appellant's employees had over the buckets while filling them in the hold

of the ship, and over the hook while attaching it to the buckets for hoisting them therefrom.

Counsel for respondent seem to proceed upon the theory that appellant and respondent were under equal obligation to refrain from using, or permitting the use of, the hoisting appliance while in a defective and dangerous condition. That such was the extent of their duties in so far as the rights of appellant's employees are concerned, we think must be conceded. But the measure of appellant's and respondent's duties to each other in this respect under their contract is quite a different question. The terms of the contract, it seems to us, plainly imply that the hoisting appliance was to be furnished by respondent in such condition and state of repair as to render its use in the manner contemplated reasonably safe to appellant's employees while filling the buckets in the hold of the ship. This would make the primary duty of seeing to the safety of the appliance rest upon respondent, especially in view of the fact that respondent retained practically the entire control over the appliance, as we have noticed. It is, however, contended by counsel for respondent that "appellant was not relying upon any implied warranty that the hoisting gear was fit and proper for the use intended, because they had actual notice that it was not;" and this, it is argued, rendered appellant equally in the wrong with respondent and thus destroyed its right of contribution. The remarks made by the learned trial court in disposing of respondent's motion for nonsuit clearly indicate that this was the theory upon which it granted that motion. So the principal error committed by the trial court, if it was error, was in deciding, as a matter of law, that the evidence conclusively showed that appellant did have knowledge of the defective condition of the tripping appliance at the time of the accident, and that it was then knowingly acquiescing in its use. This, of course, was a question of fact; and unless the evidence was so conclusive thereon as to lead the minds of all reasonable men to the same conclu-

sion, it could not be decided as a matter of law, but should have been left to the jury. Let us inquire, then, what facts appear from the evidence bearing upon the question of appellant's knowledge of the defective condition of the tripping appliance at the time of the accident.

We have noticed the limited extent of the control over the appliance by the employees of appellant, and that only while it was in use during the discharge of the ships, and that these short periods of its use were separated by intervals of from two to six weeks, during which the appliance was in the exclusive control of respondent. At the time of the discharge of appellant's ship, which arrived some weeks previous to the date of the accident, the tripping appliance had, by reason of its worn and defective condition, caused the tubs to be prematurely dumped a few times, thus disclosing the danger attending the use of the defective tripping appliance at that time. This was then known to appellant's employees, and also to its foreman there in charge of its employees. At that time respondent's foreman there in charge had his attention particularly directed to the defective and dangerous condition of the tripping appliance, by appellant's employees who had seen the premature discharge of the tubs. The tripping appliance does not appear to have been inherently defective, but was defective by reason of the worn condition of certain of its parts; and while the evidence indicates that the defect could have been discovered by a close inspection of the particular worn parts, the principal fact evidencing its defect and dangers was the premature dumping of the tubs, and if the premature dumping of the tubs had not occurred, it is highly probable that no one would have discovered or thought of the defect. It appears that the tubs had prematurely dumped from this same cause on some previous occasions, but the evidence is somewhat obscure as to the particulars of those incidents.

The discharging of appellant's ship Olympia was commenced at about 7:30 o'clock on the morning of February

28, 1910, and proceeded continuously in the usual manner until 11 o'clock of that day, when one of the tubs was prematurely dumped because of this defective condition of the tripping appliance while being hoisted from the hold, resulting in the injury to appellant's employees. Nothing occurred during the three and one-half hours in which the appliance was continuously in use that morning indicating its dangerous condition, though it is true that it was then in the same condition as on the previous occasions when the tubs had prematurely dumped. Appellant's foreman did not see the hook or tripping appliance that morning, except possibly at a distance, and had not seen it since the discharge of the ship which was there some weeks previous. The argument of counsel for respondent, as well as the views of the trial court in granting the nonsuit, evidently rests upon the assumption that the knowledge of the defective and dangerous condition of the tripping appliance, existing on the previous occasions of the discharge of appellant's ships, points with such certainty to the existence of such knowledge and acquiescence in the use of the defective appliance at the time of this accident that the question may be decided in respondent's favor as a matter of law. That such previous knowledge on the part of appellant, and the circumstances, are somewhat persuasive in favor of the trial court's conclusions of fact, may be conceded; but that such knowledge is such conclusive proof of like knowledge at the time of this accident that all reasonable men must arrive at that conclusion, we cannot agree. We therefore conclude that the question could not be decided as a matter of law, but should have been left to the jury.

In the case of *Mowbray v. Merryweather*, 65 L. J. Q. B. 50, 2 Q. B. 640 (1895), we find the parties situated similarly to those in this case. There the plaintiffs were stevedores and the defendant the owner of a ship. The plaintiffs contracted to discharge a cargo from the ship, and the defendant undertook to provide necessary and proper derricks, chains, and

other gear reasonably fit for that purpose. He failed to do so, in that he supplied a defective chain, which while being used in discharging the cargo, broke, thereby injuring one of the plaintiffs' employees. The plaintiffs, being compelled to compensate their employee, sought to recover over from the defendant in an action for breach of his contract. It was admitted by the plaintiffs that they might, by the exercise of reasonable care, have discovered the defect in the chain. Referring to the respective duties owing by these joint wrongdoers to each other and to the injured employee, Lord Esher, speaking for the court, said:

"The plaintiffs owed no duty to the defendant to examine the chain before allowing it to be used by their workmen. The only duty they owed in that respect was to the workmen."

The question of what right the plaintiffs might have to contribution in that case, had they actually known of the defective condition of the chain and acquiesced in its use while in such condition, was not involved. The case was decided apparently upon the theory that they did not know, and were not bound to discover the defect. Recovery by the plaintiffs was there sustained. In *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 86 Am. St. 478, 51 L. R. A. 781, there was involved the right of the plaintiff to recover over from the defendants, who were boiler makers and had undertaken to make for the plaintiff a boiler which would stand a certain working pressure, but which upon being put to use by the plaintiff did not stand the pressure and exploded, causing injuries to third persons. Justice Holmes, now of the United States Supreme Court, speaking for the court in that case, said:

"We are fully aware of the difficulties in the way of holding a person liable for damage when the tort of another has intervened between his act and the result complained of. *Glynn v. Central Railroad*, 175 Mass. 510, 511, 56 N. E. 698, and cases cited. Nevertheless it is held by our decisions that in some cases of that sort there may be a recovery, and

this seems to be recognized in the case upon which the defendants chiefly rely. *Nashua Iron & Steel Co. v. Worcester & Nashua Railroad*, 62 N. H. 159. The defendants, to bring themselves within the distinctions there taken, insist that we must assume that the plaintiff here might have prevented the accident by ordinary care, because it must have been held liable on the ground of a want of such care, and that, in such a case at least, it cannot make the defendants indemnify it.

"We are of opinion that the plaintiff is entitled to hold its verdict, and that if indemnity ever is to be recovered, short of an express contract of insurance, for what is in form the result of a tort on the plaintiff's part, this case belongs to the class in which it should be allowed. The plaintiff's misconduct consisted in a failure to discover by inspection a defect in an article specially made for it and probably not falling within the exceptional rule as to well known articles made by reputable makers and sold in the market ready for use. *Shea v. Wellington*, 163 Mass. 364, 369, 40 N. E. 173. Such a failure might make the plaintiff answerable to its men, but even if its conduct be called want of ordinary care, it was induced, as we must assume after the verdict, by the warranty of representations of the defendants. The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendants' judgment in a matter as to which the defendants were experts and the plaintiff presumably was not. Whether the false warranty be called a tort or a breach of contract the consequences which ensued must be taken to have been contemplated and was not too remote.

"The fact that the reliance was not justified as toward the men does not do away with the fact that the defendants invited it with notice of what might be the consequences if it should be misplaced, and there is no policy of the law opposed to their being held to make their representations good."

Among other cases arising out of contractual relations between the joint wrongdoers are: *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 7 Am. Rep. 469, and *Oceanic Steam Nav. Co. v. Compania Transatlantic Espanola*, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. 685. In the latter case, after reviewing numerous decisions, Chief Justice Follett, speaking for the court, observed:

"Sufficient cases have been cited to show that one who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter, no matter whether contractual relations existed between them or not, and that the right to indemnity does not depend upon the fact that the defendant owed the plaintiff a special or particular legal duty not to be negligent. The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him."

The following cases involving duties of joint wrongdoers as between themselves arising otherwise than by contract are in point: *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, 16 N. W. 698; *Old Colony R. Co. v. Salvens*, 148 Mass. 363, 19 N. E. 372; *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324; *Chicago & N. W. R. Co. v. Dunn*, 59 Iowa 619, 13 N. W. 722; *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316; *Town of Waterbury v. Waterbury Traction Co.*, 74 Conn. 152, 50 Atl. 3.

The case last cited involved a claim of the town against the traction company because of the act of the traction company in removing a railing from the side of a street, which was there for the protection of the traveling public, and failing to replace it after the purpose of the removal had been accomplished. In holding that the town had the right of contribution after being compelled to pay damages caused by the act of the traction company, the court said:

"As between it and the public it was undoubtedly the duty of the town in such case to properly protect travelers against the danger which the traction company had created, and by its failure to do so it became liable in damages to Ashborn. But the primary cause of the accident was the act and fault of the defendant in taking down the railing and failing to restore it, assuming that the defendant took it down as alleged. As between the plaintiff and defendant, there was no co-operation in the act of negligence which caused the injury.

The plaintiff did not permit the defendant to leave the railing down. If the defendant took it down, it promised impliedly, if not expressly, to do so in a way not to endanger public travel, and to put it up again. If it failed to keep that promise, it cannot justly charge the plaintiff with negligence either in having relied upon such promise or in having failed to compel its performance. If the defendant removed the railing, and left it down, as alleged, the fact that the plaintiff had knowledge of the defect, and neglected to repair it, although it had a fair opportunity to do so, will not prevent a recovery in this action. *Town of Hamden v. New Haven & N. Co.*, 27 Conn. 158-167; *Norwich v. Breed*, 30 Conn. 538, 545; *Holyoke v. Hadly Water-Power Co.*, 174 Mass. 424, 54 N. E. 889; *Brookville Borough v. Arthurs*, 152 Pa. St. 334, 25 Atl. 551; *Chicago City v. Robbins*, 2 Black 418, 425."

We would not go to the extent of holding in the case before us that appellant would be entirely absolved from blame, to the extent that it could have contribution from respondent, regardless of its knowledge and acquiescence in the use of the defective tripping appliance, in view of the particular relations of the parties in this case, though the logic of the decisions last above quoted viewed superficially might lead to such a conclusion. It might not be wholly out of place to view the duty of appellant to respondent here somewhat as if there were involved a question of contributory negligence or assumption of risk on the part of appellant. Indeed, that would become the question if appellant were an individual and had been personally filling the tubs and been injured, as its employees were. This, however, would in any event present a question for the jury, because we could not say, under such circumstances as are here shown, that reasonable men might not differ in their conclusions as to appellant's assumption of risk or contributory negligence, were it an individual and itself injured by respondent's defective tripping appliance.

Counsel for respondent rest their contention that the appellant and respondent were joint wrongdoers as between themselves largely upon our holding in *Tacoma v. Bonnell*,

65 Wash. 505, 118 Pac. 642, 36 L. R. A. (N. S.) 582. We think, however, that the facts there involved show that the city, which was there seeking contribution, was at least equally in the wrong with the defendant in violating a positive duty, if indeed not in the wrong in a greater degree, in causing the injury which it was required to compensate for. Nor were there any contractual relations existing between the city and Bonnell which placed either of them under any special obligation to the other. The situation there involved is well summarized in the words of Justice Mount, used on page 510, as follows:

"We have, therefore, a case where the city was engaged in handling a dangerous agency, where it had notice of the dangerous character of the wires carrying such agency and of the methods ordinarily used to prevent danger, and had failed to remedy the dangerous condition. Thereupon the defendant negligently or carelessly permitted or caused the dangerous wires to come in contact, and injury resulted to a third person."

We think that decision is not controlling here. Other cases relied upon by counsel for respondent are: *Atlanta Consol. St. R. Co. v. Southern Bell Tel. & Tel. Co.*, 107 Fed. 874; *Union Stock Yards Co. v. Chicago, B. & Q. R. Co.*, 196 U. S. 217; *Consolidated Kansas City Smelting & Refining Co. v. Binkley*, 45 Tex. Civ. App. 100, 99 S. W. 181; *Galveston, H. & S. A. R. Co. v. Nass*, 94 Tex. 255, 59 S. W. 870. In the *Atlanta Consol. St. R. Co.* case, the plaintiff, widow of the deceased who lost his life, passed over the company who owed the particular obligation to her husband, its employee, and sued the company she claimed was guilty of the real negligence which caused his death; and having recovered, that company sought contribution from the other company, the deceased husband's employer. It is apparent, therefore, that the situation was there exactly the reverse from what it is in this case. In disposing of claimed right of contribution, the court said:

"A recovery could not have been had by Mrs. Owings against the Consolidated Company unless it was guilty of such real, actual negligence as would prevent, under the authorities, a recovery against one guilty also of wrong in the same transaction."

In that case the company which was passively guilty of the wrong was not sued by the original claimant, but the company was sued which could be held only because of its active wrong. The plaintiff, of course, could not have contribution. In the *Union Stock Yards and Smelting Company* cases, a critical examination of the facts will show that neither wrongdoer owed to any other any special duty which was violated. The decision in the *Galveston Railway* case, it must be admitted, is not so easily distinguishable in principle, in view of the fact that the company from which contribution was sought was the owner of the defective car furnished to the other company, which defect resulted in the injury for which that company was compelled to compensate. If, however, that decision is out of harmony with the views we have here expressed, we will have to be content with declining to follow it.

We are of the opinion that it cannot be decided, as a matter of law, in the light of the evidence, that appellant had knowledge of the defective and dangerous condition of the tripping appliance on the day of the accident, nor that it then knowingly acquiesced in the use of such dangerous appliance, nor that such knowledge and acquiescence could, as a matter of law, be attributed to appellant. We conclude that, at the close of plaintiff's evidence, the proof was in such condition that the case should have been submitted to the jury with appropriate instructions not inconsistent with the views we have here expressed.

The judgment is reversed, and appellant granted a new trial.

MOUNT, C. J., CHADWICK, CROW, and GOSE, JJ., concur.

[No. 10673. Department One. December 19, 1912.]

K. S. Potter, *Respondent*, v. Aetna Life Insurance Company, *Appellant*.[1]

Insurance—Accident Insurance—Cause of Death—Evidence—Sufficiency. In an action upon a policy insuring against death through accidental means, there is sufficient evidence to sustain a finding that the insured was killed by gas poisoning, where it appears that deceased, a strong healthy man, was the general overseer of an incinerator, in which there occurred imperfect combustion causing smoke to escape to the room where deceased was working on Saturday, that he complained thereof, and was taken ill on Monday morning, and experts testified that his death was caused by gas poisoning.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 18, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a policy of accident insurance. Affirmed.

Farrell, Kane & Stratton and *Smith & Ramey*, for appellant.

Edgar J. Wright and *Ballinger, Battle, Hulbert & Shorts*, for respondent.

Gose, J.—This is a suit to recover upon an accident insurance policy, issued by the appellant to Frederick O. Potter. It insured "against disability or death resulting directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means." The basis of the liability as set forth in the complaint is that "on or about the 4th day of May, 1911, the said Frederick O. Potter died in the city of Vancouver, B. C., by reason of the accidental inhalation of certain noxious and poisonous gases or vapors." There was a verdict and judgment for the plaintiff, the widow of the insured. The deceased, sixty-two years of age and theretofore apparently a strong, healthy

[1]Reported in 128 Pac. 647.

man, became ill on Monday morning, May 1, 1911, and lingered until Thursday morning at 12:15, when he expired.

Two questions are presented by the appeal, one of law and one of fact: It is contended, (1) that the burden of proof was on the respondent to prove that the insured died by reason of the accidental inhalation of poisonous gases; and (2) that the evidence is insufficient upon that issue to sustain the verdict. Upon the first proposition, it suffices to say that the court instructed in harmony with the appellant's contention.

At the trial of the case, the respondent submitted evidence showing that the deceased was the general overseer of a large incinerator, which had been installed in the city of Vancouver, B. C., for the destruction of the city's garbage; that the incinerator was undergoing a test prior to its acceptance; that on the Saturday night preceding the death of the insured, the dampers were partially closed, and permitted to remain so until Monday morning; that in this manner the temperature was very materially reduced, causing an imperfect combustion; that on Monday morning a large amount of garbage, in which wet ashes predominated, was thrown into the incinerator; that the incinerator was not designed for ashes; that smoke escaped into the unloading room where the deceased was working; that he complained of the smoke to the engineer and asked him "to do something to eliminate the smoke which was terrible on the top floor," and that water was then issuing from his eyes. H. K. Benson, associate professor of industrial chemistry at the state university, testified that smoke always indicates an incomplete combustion, and that in incomplete combustion there is always carbon monoxide, a poisonous gas, present. Dr. W. T. Miles, a graduate of Jefferson Medical College with twenty-five years' experience as a practitioner in medicine and surgery and who had had experience with poisonous gases, in answer to a hypothetical question based upon the evidence, said that death was caused by gas poison. The physician who performed the autopsy said that death was due to myocarditis, and testified

to the same effect. He also testified to the condition of the heart, lungs, liver, and stomach as disclosed at the autopsy. Dr. Miles, in rebuttal, said that these conditions were the effect of gas poison and not the cause of death.

The appellant argues that "the evidence wholly fails to show that there was poisonous gas thrown off by the incinerator in sufficient quantities to produce death." The conditions present at the incinerator on Monday morning, the age and health of the deceased, his illness, and symptoms following to the time of his death on Thursday morning, were detailed in the hypothetical question propounded to Dr. Miles, and he said that death was due to gas poisoning. His testimony is vigorously assailed by the appellant, but the verdict of the jury forecloses inquiry upon the veracity of the witnesses and the weight of the evidence. The physician who performed the autopsy further testified that, if death had been due to poisoning by *monoxide* gas, the blood would have been a bright or cherry red, and that the absence of this color in the blood indicated that death was not due to such poison. Dr. Miles said, in answer to this testimony, that there should have been a microscopic or spectroscopic examination of the blood. Neither of these tests was made. He also said that the color of the blood after death would depend largely upon the mixture of the gases thrown off from the incinerator as a consequence of incomplete combustion. Aside from the conditions present at the incinerator on Monday morning, which were not controverted, the evidence is wholly of an expert character. The physicians differed as to the cause of the death. A detailed discussion of the evidence would be of little value to the litigants and of no value to the bar. Enough has been said to show that there is substantial evidence to support the verdict.

The judgment is affirmed.

Mount, C. J., Chadwick, Crow, and Parker, JJ., concur.

[No. 10488. Department One. December 19, 1912.]

WILLIAM HAZLETT, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT. It is not an abuse of discretion to refuse a new trial on the ground of the newly discovered evidence of a witness who would testify, in contradiction of several witnesses, that plaintiff had told him several years before that he was ruptured and unable to do hard work, where the same was contradicted by counter affidavits, and it is not probable that the evidence would change the result.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 8, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger on a street car. Affirmed.

James B. Howe and *H. S. Elliott*, for appellant.

James A. Dougan, for respondent.

GOSE, J.—This is an action to recover for personal injuries, alleged to have been sustained by the plaintiff while a passenger upon one of the defendant's street cars, in consequence of its alleged negligence. The charge is that the car was run at a high rate of speed around a sharp curve, throwing the plaintiff from his seat upon and across the car step, in such a manner that his abdomen came in contact with the edge of the step. At the trial, the defendant admitted its liability, but required the plaintiff to prove the extent of his injuries. There was a verdict and judgment for the plaintiff for $3,000. This appeal resulted.

The single question presented is, whether the court erred in denying the motion for a new trial. At the time of the trial, the respondent had a double hernia and swollen ankles. He testified that he was also suffering at times from pains in

[1]Reported in 128 Pac. 677.

his head, back, and the back part of his neck, and that he had none of these ailments before he sustained the injury. His wife corroborated his testimony to the effect that none of the objective conditions antedated the accident. The family physician testified that he had no knowledge of the existence of either the hernia or the swollen condition of the ankles before the respondent was injured. Dr. Willis, a witness for the appellant, testified that he first examined the respondent five days after he met with the accident; that he did not then discover the hernia, and that he was not sure of its presence when he examined him about fifty-five days later. There was strong evidence that the respondent was in good health, and that he had worked regularly at hard physical labor up to the time he received the injury.

The motion for a new trial was based upon a showing of diligence and the affidavit of a Mr. Pratt. The substance of his affidavit is that he had known the respondent intimately for the seven or eight years immediately preceding the date of his affidavit, and that, shortly after he became acquainted with the respondent, the latter informed him that he was ruptured. He further says, that the respondent had been lame on account of the swelling of his feet; that he had often complained of being in poor health, and that to the best of his knowledge the respondent had not been able "for many years to perform any hard manual labor." Counter affidavits were made by the respondent and his wife. The former denied making the statements, and they both asserted their falsity in fact. They were supported by the affidavit of a third party, which in substance is that the respondent had worked regularly and steadily for a mill company at hard manual labor, and that he appeared to be a strong, able-bodied man.

The granting or the denying of a new trial are matters within the sound discretion of the trial judge, and his ruling will be sustained except in cases of manifest abuse of discretion. *Knapp v. Chehalis*, 65 Wash. 350, 118 Pac. 211;

Walgraf v. Wilkeson Coal & Coke Co., 65 Wash. 464, 118 Pac. 343. No abuse of discretion is shown here. It is true the appellant did not attempt directly to show that the hernia existed before the accident. If the respondent had been in poor health and unable to work for any considerable period of time before he received the injury in controversy, it would seem that the appellant would have had no difficulty in finding witnesses to establish that fact.

"The law, in view of the liability of the human mind to err in remembering the statements and declarations of parties, receives and weighs such evidence with great caution." *Denny v. Holden*, 55 Wash. 22, 103 Pac. 1109.

Testimony as to the admissions of a litigant made many years before their narration in court is recognized as the weakest kind of evidence. In view of the entire record, it cannot be said that there is a reasonable probability that a new trial would materially reduce the damages. A new trial was denied upon a much stronger showing in *Knapp v. Chehalis*, *supra*, and we held that there was no abuse of discretion.

The judgment is affirmed.

MOUNT, C. J., CHADWICK, CROW, and PARKER, JJ., concur.

[No. 10509. Department One. December 20, 1912.]

J. H. GREEN, *Respondent*, v. H. B. RUSSELL *et al.*, *Appellants*.[1]

COURTS—REVIEW OF ORDERS—VACATION OF JUDGMENT—NEW TRIAL—SECOND APPLICATION. After an alternative order refusing to vacate a judgment and grant a new trial unless costs are paid has become final and effective by defendants' failure to pay the costs within the time fixed, the trial court is without jurisdiction to entertain a second motion to vacate the judgment.

[1]Reported in 128 Pac. 645.

New Trial—Second Application—Motion to Extend Time. Where an order for a new trial is made conditional upon payment of costs within a limited time, a motion to extend the time made after default is too late, as it would be in effect granting permission to interpose a second motion for a new trial.

Judgment—Vacation—Grounds. A motion to vacate a judgment, entered on the nonappearance of the defendant and his counsel at the trial, is properly denied, where it appears that both defendant and his attorney were neglectful, the defendant going east for several weeks without making inquiry about the case or keeping in touch with his attorney so that he did not get notice of the time set and the attorney's withdrawal from the case until after the trial.

Appeal from an order of the superior court for Okanogan county, Pendergast, J., entered January 25, 1912, refusing to vacate a judgment and grant a new trial. Affirmed.

Neal & Neal, for appellants.

P. D. Smith and *W. C. Gresham*, for respondent.

Crow, J.—This action was commenced by J. H. Green against H. B. Russell and Agnes Cole, to recover for labor performed by himself and assigns at the defendants' special instance and request. Until the completion of the issues and the setting of the case for trial, the defendants were represented by G. V. Alexander, as their attorney. On September 5, 1911, the cause was set to be tried on November 1, 1911. When it was called on the latter date, the plaintiff and his witnesses appeared, but no appearance was made by the defendants or their attorney. A trial was then had, and judgment was entered in plaintiff's favor. On November 4, 1911, the defendant Agnes Cole moved the court to vacate the judgment and for a new trial. On the showing then made, the trial judge, on November 13, 1911, made the following order:

"Ordered that said motion be and the same is hereby granted on the following conditions, to wit: That the said defendant Agnes Cole pay to the clerk of this court, for the plaintiff J. H. Green, within twenty days from this the 13th day of November, 1911, plaintiff's costs in this matter as fol-

lows, to wit: Thirty and no-100 ($30.00) dollars, as witness fees; and six and 20-100 ($6.20) dollars, as costs for serving said subpoenas on said witnesses, and ten and no-100 ($10.00) dollars as attorney's fees and five and no-100 ($5.00) dollars to said plaintiff J. H. Green. It is further ordered that unless the above payment is made as aforesaid, and within the time aforesaid, that this order shall be of no effect, and that the said defendant Agnes Cole will be refused a new trial and that the said judgment ordered in this cause shall remain intact the same as if this order had not been made."

The defendant Cole did not pay the costs within the twenty days. On December 14, 1911, execution was issued, under which personal property of both defendants was seized and advertised for sale. On December 26, 1911, both defendants moved the court to vacate the judgment, to grant a new trial, and to enjoin the sheriff's sale. This was the second motion made by the defendant Agnes Cole, who, on December 28, 1911, paid to the clerk of the superior court the costs above mentioned. The motion of both defendants to vacate the judgment, for a new trial, and for an injunction, was denied on January 23, 1912. Thereafter on January 25, 1912, the defendant Agnes Cole orally made the following motion which was afterwards reduced to writing:

"Defendant Agnes Cole now moves the court for an order extending the time within which she may comply with the terms and conditions of the order made on November 13th herein, granting her a new trial, and that such order shall relate back to the date when the twenty days mentioned in said order expired, upon the grounds and for the reasons that she was unable to comply with the terms of said order until the 18th day of December, 1911; that she did on the 28th day of December, 1911, cause said money to be paid in to the clerk of this court where the same has ever since remained and now is; that she used her best efforts and endeavors to comply with said order, and acted in good faith in every respect in connection therewith. This motion will be heard upon the affidavits and files and records of this court and the docket and records of the clerk in connection with said cause,

and upon all the affidavits filed herein in support of her motion made on the 6th day of November, 1911, for a new trial herein, and upon the affidavits filed herein in support of her motion made on the 26th day of December, 1911."

This motion was also denied. The defendants thereupon appealed from the order of January 23, 1912, refusing to vacate the judgment and refusing a new trial, and from the order denying an extension of time to defendant Agnes Cole, for the payment of costs.

The order of the trial court made and entered on November 13, 1911, which awarded a new trial to the appellant Agnes Cole on payment of costs within twenty days, was an alternative order which amounted to a denial of a new trial in the event that the costs should not be paid within the period named. Upon her subsequent default, the order at once became final and effective as a refusal to vacate the judgment as against her, or grant her a new trial. This being true, the trial court, as far as the appellant Agnes Cole was concerned, was without jurisdiction to entertain another and later motion to vacate the judgment and grant a new trial. *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164; *Boylan v. Bock*, 60 Wash. 423, 111 Pac. 454.

Appellant Agnes Cole, however, contends that she was unable to pay the costs within the twenty days allowed. The time to have complained of the twenty-day period as too brief was when the order was made. This she did not do. Nor did she then appeal. In *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11, the court said:

"The power of the court to make an order for a new trial conditional upon payment of costs by the moving party is unquestioned, and a failure to perform the condition converts the order into a denial of the motion. (*Garoutte v. Haley*, 104 Cal. 497; *Brown v. Cline*, 109 Cal. 156). The condition is therefore an essential part of the order, and the right to revoke it ceases when the power of the court over the order ceases. When the power of the court to set aside the order as to the award of a new trial is at an end, its power to elim-

inate one of the substantial terms of the order must, for the same reasons, be held to have ended. The question, then, is as to the power of the trial court to vacate an order granting or denying a new trial after it has once been regularly made and entered. The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute."

The motion of Agnes Cole for an order extending the time within which to pay the costs after she had defaulted was properly denied, as the substantial effect of such an order would have been the granting of permission to interpose a second motion for a new trial.

As to appellant Russell, we are unable to conclude that the trial court erred in denying his motion. We have examined his showing, and conclude that it does not present a sufficient excuse for his failure to appear. His attorney attempted to advise him by letter of the date of setting, but appellant Russell insists that for some reason the letter did not reach him prior to the trial. It does not appear that the attorney, who received no answer or acknowledgment from appellant, made any further effort to reach him, or that appellant himself took any active interest in the progress of his cause. They both seem to have been neglectful. Appellant's own affidavit shows that he went east on business for several weeks without making any previous inquiry as to when the cause would be heard, and that he visited different places without making any effort to keep in touch with his counsel, who in fact had withdrawn from the case and had, without success, attempted to notify him by letter of such withdrawal. No charge of negligence can be suggested against appellant's present counsel.

The trial judge did not abuse his discretion, nor did he commit prejudicial error in refusing a new trial.

The judgment is affirmed.

Mount, C. J., Parker, Chadwick, and Gose, JJ., concur.

[No. 10525. Department Two. December 20, 1912.]

Northwestern Electric Company, *Respondent*, v. Lyle Light, Power and Water Company, *Appellant*, Emma Dave, *Defendant*.[1]

Eminent Domain—Proceedings—Damages—Property and Rights Taken. Where a riparian owner had granted the right to take water from the river limited to such quantity as would result in no damage to her fishery and fishing rights, she thereby conveyed all her water rights except as she reserved sufficient to protect her fishery and divested the lands of their character as riparian lands; hence, on condemnation of the rights of her subsequent lessee, no damages could be allowed for loss of riparian rights, although the lease purported to include riparian rights except as reserved for a fishery.

Appeal by defendant from a judgment of the superior court for Klickitat county, McKenney, J., entered December 29, 1911, awarding damages in eminent domain proceedings, after a trial to the court. Affirmed.

R. Sleight, for appellant.

Williams, Wood & Linthicum (*Erskine Wood*, of counsel on the brief), for respondent.

Morris, J.—The respondent, a public service corporation, brought this proceeding to condemn the rights of the defendants in certain lands along the Klickitat river, together with the water rights riparian thereto. The court having made its decree of public use and appropriation, the cause continued to ascertain the damages to be awarded defendants. This feature of the cause was submitted to the court without a jury, and a decree has been entered awarding Emma Dave $4,000, and the Lyle Light, Power & Water Company $2,500, from which decree the company has appealed.

The only error assigned is in assessing the damages of the company at $2,500. The land was originally owned by

[1]Reported in 128 Pac. 674.

Emma Dave, from whom the respondent obtained a deed, the only material part of which is the following grant:

"Also the right to take water from the Klickitat river from some point on the river above the land of the grantor Emma Dave, and carry the same across said land by means of flumes, canals, or pipe lines constructed upon said forty-foot right of way, the amount of water to be taken from the river to be limited to such a quantity as will result in doing no damage to the fishery and fishing rights of the grantor."

It is manifest that, under this grant, respondent obtained from Emma Dave all the riparian rights vested in her ownership of the land, except the fishing rights, and the $4,000 awarded her is the court's valuation of the damage caused her by the taking of these fishing rights. Subsequently Emma Dave gave a lease of the land adjoining the river and embraced in this proceeding to D. E. Keasey, who thereafter transferred the same to appellant. This lease was for ninety-nine years, and in so far as is here material, included the riparian rights to the waters of the river, except, as in the deed to respondent, it contained an express reservation of fishing rights. These instruments, it seems to us, are at variance with appellant's contention that it is entitled to the riparian rights appurtenant to the land embraced in the lease, and must determine this appeal adversely to its contention that the court below failed to award it appropriate damages. Under her deed, Emma Dave conveyed to respondent all her riparian rights save the right to take fish from the river. The language of the grant is susceptible of no other construction. When she conveyed "the right to take water from the Klickitat river from some point on the river above the land," she granted respondent the right to take all the water flowing in the river except as she reserved sufficient water to protect her right of fishery. There can be no water rights where there is no water; and hence, when Emma Dave leased the land to Keasey, she had no water rights except her fishery right, which she expressly reserved

from the lease. When, therefore, under this proceeding this fishing right was condemned, the respondent, upon payment of the compensation awarded, became possessed of all water rights in this river that had formerly vested in Emma Dave by virtue of her ownership of these riparian lands. These lands, having been divested of their character as riparian lands, were deprived of any value formerly attaching to them as such, and all that need be awarded appellant is their value as land.

There can be little question but that $2,500 is ample compensation for such valuation, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, ELLIS, and MAIN, JJ., concur.

[No. 10885. *En Banc.* December 21, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Daniel Griffith et al., Plaintiff*, v. THE SUPERIOR COURT FOR PIERCE COUNTY, *Respondent*.[1]

PROHIBITION—WHEN LIES—ADEQUATE REMEDY BY APPEAL—ORDERS FOR PERFECTING APPEAL—JURISDICTION. Prohibition will not lie to prevent the enforcement of an order requiring the defendant, who had employed a court stenographer, to return to the stenographer his notes of the trial so that he might extend the same for use in preparing a statement of facts on appeal; since the court had jurisdiction of the subject-matter and the parties, and prohibition does not lie to correct error where there is an adequate remedy by appeal.

DIVORCE—APPEAL—PERFECTING APPEAL—RECORD—STATEMENT OF FACTS—JURISDICTION PENDING APPEAL. The superior court has jurisdiction, pending appeal in a divorce case, to order the defendant to return to the stenographer employed by him, the notes of the evidence so that they might be extended for the use of the plaintiff in preparing a statement of facts; in view of Rem. & Bal. Code, § 996, providing that on appeals in a divorce case, the superior court shall certify the evidence adduced at the trial, and Id., § 1731, providing that notwithstanding the appeal has been perfected, the superior

[1]Reported in 128 Pac. 644.

court shall retain jurisdiction for the purpose of settlement and certifying bills of exception and statements of facts and for all purposes in so far as the cause is not affected by the appeal.

Application filed in the supreme court November 25, 1912, for a writ of prohibition against the superior court for Pierce county, Easterday, J., to prevent enforcement of an order to deliver the stenographer's notes pending an appeal. Denied.

Rickabaugh & McElroy and *Williamson, Williamson & Freeman*, for relators.

Frank H. Kelley, for respondent.

FULLERTON, J.—This is an original application for a writ of prohibition. In May, 1912, one Leva Griffith began an action in the superior court of the county of Pierce against her husband, Daniel Griffith, for a divorce, setting forth in her complaint certain allegations of fact which if proven would entitle her to the relief sought. Issue was taken in the complaint by the defendant and a trial had before the court, in which the evidence of the respective parties was given orally and taken down by a stenographer employed by the defendant Daniel Griffith. At the conclusion of the trial, the court determined that the evidence was insufficient to support the allegations of the complaint; and thereafter and on September 3, 1912, entered a written judgment or decree denying the divorce and dismissing the action. The plaintiff thereupon in open court gave notice of appeal from the judgment entered to the supreme court, and within five days thereafter filed the statutory appeal bond necessary to perfect the appeal.

On November 20, 1912, the plaintiff moved the court for an order directed to the defendant and his attorneys requiring them to turn over to the stenographer the original notes of the testimony taken at the trial, so that the stenographer might extend the same for use in preparing a statement of facts on the appeal; averring in affidavits filed in support of

the motion that such notes had been taken from the stenographer by the defendant, through his attorneys, and that they had refused to return the same to the stenographer on his demand. A hearing was had on the motion after due notice, whereupon the trial court made the order requested. This writ is sought to prevent the court from enforcing or attempting to enforce the order, on the ground that it was made without jurisdiction.

In support of the application for the writ, two contentions are made. It is first contended that, inasmuch as there is no law in this state creating an official court stenographer, the services of the stenographer, if one is employed, belong to the party employing him; hence he is not subject to the direction or control of the court, and any order made with respect to him must necessarily be void. But we cannot agree with this reasoning. Possibly an order of the court affecting the disposition of the notes taken by a stenographer under the circumstances shown here may be erroneous and subject to vacation in some appropriate form of review, but it is not void for want of jurisdiction. The court had jurisdiction over the subject-matter of the order, and over the parties, and hence jurisdiction to make an order in the premises. Whether or not it made a correct order, does not affect its jurisdiction. The error, therefore, if error was committed, was one made in the exercise of competent jurisdiction, and not one made without jurisdiction, and is not subject to correction by a writ of prohibition.

"The writ of prohibition will not be issued as of course, nor because it may be the most convenient remedy. Nor will it be allowed to take the place of an appeal, or perform the offices of a writ of review. It is a preventive remedy, and as such is bounded by rigid rules, and is only issued in cases of extreme necessity. The remedy is employed only to restrain courts and inferior tribunals exercising judicial functions from acting without or in excess of their jurisdiction; and, if the court or tribunal sought to be restrained has jurisdiction of the subject-matter in controversy, a mistaken

exercise of its acknowledged powers will not justify the issuance of the writ. Stated in another way, 'it matters not whether the court below has decided correctly or erroneously; its jurisdiction being conceded, prohibition will not go to prevent an erroneous exercise of that jurisdiction.'" *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 143.

The second contention is that the court was without jurisdiction to make the order because the cause in which it was made was pending in this court on an appeal duly perfected. But the statute specially relating to appeals in divorce proceedings, Rem. & Bal. Code, § 996, provides that, when either party to such a proceeding shall signify a desire to appeal from any of the orders of the court, the court shall certify the evidence adduced at the trial so that the supreme court shall be possessed of the whole case as was the superior court; and the general statute relating to appeals (Id., § 1731), provides that, notwithstanding the appeal has been perfected by giving notice and filing a bond, the "superior court shall, nevertheless, retain jurisdiction for the purpose of all proceedings by this act provided to be had in such court, and for the purpose of settlement and certifying the bills of exceptions and statements of facts, and for all purposes in so far as the cause is not affected by the appeal." In virtue of these statutes, the superior court, after an appeal, has jurisdiction to make all orders necessary to enable it to settle and certify bills of exceptions and statements of facts, and the order here in question was one clearly falling within such jurisdiction.

The application is denied.

ALL CONCUR.

[No. 10630. Department Two. December 21, 1912.]

PARIS A. WILLIAMS, *Respondent*, v. H. A. WURDEMANN *et al.*, *Appellants*.[1]

PHYSICIANS AND SURGEONS—MALPRACTICE—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. Whether surgeons were negligent in failing to remove all of the packing and to stop a hemorrhage, following a surgical operation on plaintiff's nose, is for the jury, where there was evidence tending to show that they failed to do so, and that a speedy recovery followed on its removal by another surgeon.

SAME—DEFENSES—CONTRIBUTORY NEGLIGENCE. Where a patient has been improperly treated, he may quit the treatment at any time, and it is no defense to an action for malpractice that the patient did not return for further treatment, when he found he was not getting along as he should, notwithstanding it was highly probable that had he done so, the treatment would have been changed and a cure effected.

TRIAL—INSTRUCTIONS—EVIDENCE—PLEADINGS AND ISSUES. In an action for malpractice, instructions on the theory that the defendants treated the plaintiff as specialists, are proper where the undisputed evidence showed that to be the case, notwithstanding the complaint alleged the cause of action against them as general practitioners.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for malpractice, an instruction on the subject of the degree of care required, referring to it as such care and skill as the plaintiff "should expect," or as the public had a "right to expect" is not prejudicial error, where in the same instruction defendants' undertaking was specifically stated to be to use "reasonable care and skill," and also later instructions stated the rule in the language requested by the appellants.

Appeal from a judgment of the superior court for King county, Everett Smith, J., entered August 15, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for malpractice. Affirmed.

John W. Roberts, for appellants.

Beeler & Sullivan, for respondent.

[1]Reported in 128 Pac. 639.

FULLERTON, J.—This is an appeal from a judgment rendered against the appellants for malpractice. The errors assigned and argued in the briefs are that the trial court erroneously refused to sustain the appellants' challenge to the sufficiency of the evidence, and gave erroneous instructions to the jury.

The evidence was conflicting on practically all of the material issues. This court is therefore obligated to assume as true that version of it which tends to support the jury's verdict. The appellants were physicians and surgeons specializing in the treatment of diseases of the eye, ear, nose and throat. The respondent suffered from a ringing sensation and partial deafness in his left ear, and employed the appellants to treat him for his malady. He consulted particularly with the appellant MacWhinnie, and in the course of the treatment the doctor performed a surgical operation on his nose, removing a bony or cartilaginous growth therefrom, called in the record a spur. The wound made by the operation bled somewhat profusely; so much so, indeed, that it was found necessary in order to stop it to remove the respondent to a hospital and pack that part of his nose surrounding the wound with absorbent cotton. The doctor first undertook to pack the nose with cotton tampons pushed in with instruments; but finding that he could not stop the hemorrhage in this way, ran a string through the nasal channel into the mouth, and by fastening cotton tampons to the string succeeded in drawing them into the nose tight enough to accomplish his purpose. After lapse of several hours, the string on which were fastened the tampons was removed. The respondent was then given a lotion for local application, and told to return for further treatment. No time seems to have been fixed for respondent to return, and he did not call until some six days later, when he found that Doctor MacWhinnie had left the office for a visit to the eastern states to be gone for an indefinite time. The respondent was waited upon by Dr. Wurdemann, to whom he described his condition, and was

advised to go home and remain quiet for a time. The respondent however did not improve as was expected. On the contrary, his nose soon began to discharge fetid matter, and some days later he consulted with another physician, who, on examining the nose, found a cotton tampon on one side and an adhesion on the other. The doctor treated the patient by removing the tampon, dividing the adhesion, and washing out the nose. Recovery speedily followed.

It is respondent's claim that the tampon found in his nose by the last mentioned doctor was a part of the packing put in originally by Dr. MacWhinnie to stop the bleeding following the surgical operation, and was, by an oversight on his part, not removed at the time of the removal of the tampons attached to the string; that this was not discovered by Dr. Wurdemann, whom he consulted some days after the operation, and was the cause of the disorders following that operation. The plaintiff's evidence, we think, tends reasonably to support this conclusion, and this being so, we think it was for the jury, and not the court, to say whether the doctors were guilty of such negligence as constituted malpractice.

It is further argued, however, in this connection, that the respondent was obligated to return to the appellants for further treatment when he discovered that he was not getting along as well as he should, and that his failure so to do was such negligence on his part as will prohibit a recovery against the appellants. But such is not the rule. It is true, undoubtedly, that if a patient employs a physician to treat him for a malady and receives careful and skillful treatment at his office, but fails to return to the office for further treatment before he is discharged by the physician, and in consequence suffers an injury, he is not entitled to recover against the physician for such injury; and it is also true that a physician's liability ceases the moment his patient dismisses or discharges him, if his treatment of the case has been proper up to that time. But these principles have no application where the physician's treatment of the case has been

improper. When being improperly treated, the patient is at liberty to quit at any time, and he may hold the physician liable for the injuries suffered by him because of the improper treatment, notwithstanding it is highly probable that the physician, had the patient continued his treatment, would sooner or later have discovered that his treatment was improper and would so have modified it as to effect a cure. *Dashiell v. Griffith*, 84 Md. 362, 35 Atl. 1094; *Kendall v. Brown*, 74 Ill. 232; *DuBois v. Decker*, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. 529, 14 L. R. A. 429; *Sauers v. Smits*, 49 Wash. 557, 95 Pac. 1097, 17 L. R. A. (N. S.) 1242. We conclude, therefore, that the court did not err in refusing to sustain the challenge to the sufficiency of the evidence.

The court on its own motion gave to the jury the following instructions:

"(2) You are instructed that, where a physician undertakes the treatment of a patient and subsequently performs an operation, not only must he use reasonable and ordinary care and skill in its performance but also in the subsequent treatment of the case. It is his duty to give the patient such attention after the operation as the necessity of the case demands, taking into consideration the duty he owes to the patient as regards such care, and if you find from the evidence that the defendants or either of them performed an operation upon the plaintiff and did not thereafter use such reasonable care and skill in subsequent treatment as the plaintiff should expect from the defendants or each of them, or such care as is imposed upon physicians holding themselves out as specialists in ailments such as contracted for by the plaintiff, and if you further find from the evidence that because of such failure to use reasonable care and skill in the subsequent treatment of the plaintiff, that the plaintiff was permanently injured or suffered pain, injury and damage, then you will find for the plaintiff in such sum as you deem just and proper, following the instructions of the court in this regard.

"(3) The terms 'careless' and 'negligent,' as used in these instructions, do not imply lack of skill or capacity but simply a disregard of ordinary prudence and care which one

has a right to expect from persons holding themselves forth as physicians specially fitted to cure certain ailments, and although you may believe the defendants to have possessed all the qualifications necessary to competent and skilful physicians and surgeons as specialists, yet if it has been proven that they, or either of them, were careless and negligent in treating the plaintiff and that through such carelessness and negligence plaintiff has been permanently injured or that pain, suffering or injury has been brought about due through such carelessness and negligence, then the mere fact that the defendants or either of them may have been competent and skilful constitutes no defense to this action."

At the request of the appellants, it gave the following:

"(6) A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law imposes upon him the duty of possessing reasonable skill and learning. He is not liable for mistakes, if he uses the method recognized and approved by those reasonably skilled in the profession. He does not undertake to insure or guarantee success. If he treats the injury with a reasonable degree of skill and care, he is not responsible for the results.

"(7) The mere fact that no cure was effected or that the treatment or operation was not successful does not create a liability or raise a presumption of want of proper care or skill. The law accords the medical practitioner the presumption that he has done his duty and the burden is on the plaintiff to prove want of reasonable care or skill and that the same was the proximate cause of the injury. That is to say, that the injury complained of resulted from said want of care or skill. In order for the plaintiff to recover in this action, it is necessary for him to prove by the greater weight of the evidence something more than a bad result. That is to say, he must establish by the greater weight of evidence that the injury is the result of a want of proper care and skill on the part of the defendants.

"(8) A physician is not to be judged in the light of any after acquired knowledge in relation to the case, and his neglect or want of care are to be determined by reference to what was known in relation to the case at the time, and must be determined by reference to pertinent facts then in existence of which he knew, or should have known in the exercise

of due care, and if the defendants in this case, or either of them, in the light of known or knowable facts in existence at the time the plaintiff was being treated by the defendants or either of them, applies skill and judgment with due care, they are not liable for any damages or injuries consequent upon an honest mistake or an error in judgment in making a diagnosis, and if what the defendants, or either of them, did was done in accordance with recognized authority and good current practice, then they performed the full measure of their duty."

It is objected to the instructions given by the court on its own motion that it is assumed therein that the appellants were treating the respondent as specialists; whereas, this action was brought against them as general practitioners, and there was no issue as to the character in which they were sued. But while it is true that the respondent did not allege in his complaint that the appellants undertook as specialists to treat him for the particular malady with which he was suffering, yet he was permitted to testify without objection to facts tending to show that the appellants held themselves out as specialists in the treatment of the disease with which he was afflicted; and the appellants themselves testified, in answer to questions put to them by their own counsel, that they were practicing as specialists in the treatment of diseases of the eye, ear, nose and throat. Under our practice, it is not error for the court to instruct the jury according to the case made by the undisputed evidence, notwithstanding such evidence may go beyond the issues made by the pleadings. There was therefore no error in assuming that the appellants undertook to treat the respondent as specialists.

The second objection is that the court, in the instructions given upon his own motion, gave to the jury a wrong rule for measuring the degree of care and skill which the law exacts of physicians and surgeons in the treatment of diseases. It is said that the court, in its first instruction quoted, stated this rule to be such degree of care and skill as

the respondent "should expect" of the appellants; and in the second, such as "one," that is the public generally, "had a right to expect" of them. But manifestly this was not the court's meaning, for in the same instruction he states specifically that their undertaking was to use "reasonable care and skill," and later on gave all of the instructions asked for by the appellants which bore on the question of the degree of care and skill the appellants were legally bound to exercise in the care of the respondent. It is true, none of those instructions state the rule as this court has heretofore announced it, or perhaps as the authorities generally announce it; but since the court stated the rule in the very words submitted by the appellants themselves, it is difficult to see how they are in a position to complain.

We find no substantial error in the record, and the judgment will stand affirmed.

MOUNT, C. J., MORRIS, ELLIS, and CHADWICK, JJ., concur.

[No. 10480. *En Banc.* December 23, 1912.]

JAMES T. WENTWORTH, *Respondent*, v. JOHN R. MOORE *et al.*, *Appellants*.[1]

CORPORATIONS—FRAUDULENT SALE OF STOCK—LIABILITY OF AGENT—FRAUD. Where an agent, selling stock on a commission, induced plaintiff to purchase the stock by representations which he knew to be false respecting the personnel of the stockholders and the financial strength of the company, and which were relied on, he is liable to the purchaser in an action for damages for deceit.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 3, 1912, upon findings in favor of the plaintiff, in an action for damages from fraud in a sale of stock, after a trial to the court. Affirmed.

Reynolds, Ballinger & Hutson, for appellants.

G. D. Emery and *Gates & Emery*, for respondent.

[1]Reported in 128 Pac. 634.

Crow, J.—The Alaska-Yukon-Pacific Exposition was held in the city of Seattle during the year 1909. Some time prior thereto, a corporation, known as Electric Transportation Company, having its principal office in the city of Seattle, was organized with a capital stock of $50,000, under the laws of this state, for the purpose of purchasing and constructing electric launches and automobiles to carry freight and passengers from the city to the exposition. This company offered its capital stock for sale, and employed the defendant John R. Moore to make sales. Numerous sales were made by him to investors, one of whom was the plaintiff, James T. Wentworth, who purchased twenty-five shares at par for $2,500. This action was commenced by Wentworth against John R. Moore individually, John R. Moore as guardian of Lillian C. Moore, and Lillian C. Moore, to recover damages resulting from the sale. Plaintiff alleged fraud, charging that Moore made representations as to the financial strength of the company and the personnel of the stockholders which he knew to be false, and upon which plaintiff relied. Plaintiff previously sued the transportation company, and had recovered from its receiver a portion of the money which he had paid for the stock. Prior to the commencement of that action, the defendant Moore had represented to plaintiff and had caused him to believe that he (Moore) was a nonresident of this state, and for that reason he was not joined as defendant in the first action. Plaintiff alleged that Moore immediately invested the money he received from plaintiff for the stock in Seattle real estate, which was conveyed to Moore's minor daughter Lillian C. Moore; that Moore afterwards caused himself to be appointed as her guardian, and that the plaintiff was entitled to have a lien decreed in his favor upon the real estate thus purchased. The trial court entered judgment in plaintiff's favor for $1,170, and costs, decreed the same to be a lien upon the real estate conveyed to Lillian C. Moore, and ordered the real estate sold. The defendants have appealed.

The appellant John R. Moore, when acting as agent for the Electric Transportation Company in making the sale to respondent, was to receive, and did receive, an exorbitant commission. The sale was made on March 15, 1909. Respondent claims, the trial court found, and the evidence shows, that Moore represented to respondent that one Charles H. Lilly, a prominent business man of Seattle, held $2,000 of the stock; that one Mrs. E. S. Price held $2,000 of the stock; that one C. J. Zintheo held $7,000 of the stock; that one J. A. Lane held $5,000 of the stock; that John R. Moore himself held $2,000, and that all of their subscriptions have been fully paid in cash. He further represented that all the capital stock had been subscribed but $15,000. These representations were made orally and in writing. Appellant further stated, that the company was in good financial condition; that it had contracted for eight electric and two gasoline trucks of forty passengers capacity; that it had paid $10,000 in cash on the contract; that it had on deposit $5,000 in cash to apply on such purchase; that the remainder of the purchase price was to be paid in monthly installments out of the receipts from the automobiles; that the automobiles were then in transit, and that they would be delivered on or before April 15, 1909. The evidence shows that each and all of these representations were false, that they were believed and relied upon by the respondent, and that Moore personally knew many of them to be false.

Appellant Moore contends, that he was acting only as agent for the transportation company in selling the stock; that the facts upon which he based his representations had been communicated to him by the transportation company; that respondent did not segregate the various representations upon which he relied, some having been made to him by one Zintheo, general manager of the corporation, and others by appellant Moore; that appellant had no reason to doubt the truth of the representations made by him; that he only represented the facts as given to him by his employer; and

that respondent, before making his purchase, had ample opportunity to investigate the corporation and its solvency.

The position of the appellant Moore, as disclosed by these contentions, seems to be that, at the time of making the sale, he did not know his statements were false; that in making them he properly relied upon previous information communicated to him by his employer; and that having himself acted in good faith, he cannot be held liable in this action. The evidence convinces us that he did know that a very considerable portion of his statements and representations were false, and that he should have known others were false. As an illustration, it may be remarked that, when he represented Mr. Lilly to be a stockholder, he had personal knowledge of the fact that, although Mr. Lilly previously subscribed and gave his notes for stock, he, within a few days thereafter, rescinded his contract of subscription, surrendered his stock, and demanded a return of his notes; and that the transportation company surrendered a portion of his notes, and agreed to protect him against others which it had sold to an innocent purchaser. Appellant Moore knew of this previous rescission by Lilly and the return of his notes when he represented to respondent that Lilly was still a stockholder. Other instances of his personal knowledge of the falsity of his representations might be cited. The evidence further shows that, as soon as he received a payment on the stock from respondent, he invested it in the Seattle lots, taking title in the name of his seven-year old daughter; that for some time thereafter he remained in the state of Oregon, informing and persuading respondent that he was a nonresident of this state, and that he did so for the evident purpose of escaping an action for fraud and damages in the courts of this state. The record also shows that other investors in the stock of this company had been defrauded by appellant. Upon the facts proven, we fail to see how he can escape liability.

Appellant insists that respondent relied only upon a written statement prepared and delivered to him by Zintheo. This

contention is not sustained by the evidence. It appears that a written but false statement relative to the financial condition of the transportation company, prepared for the purpose of showing its solvency, was delivered to respondent by either Zintheo or appellant at a time when both were present. Wentworth testified that the document was handed to him in compliance with his request for a statement, as he had been told by Moore that the books were not posted and could not be inspected. Appellant testified that it was given to respondent by either himself or Zintheo, while Zintheo denied giving it to respondent. Whatever the facts may be as to its delivery to respondent, appellant was party to the transaction, knew the statement was false in many particulars, received the benefit of a large commission from the corporation on the sale of the stock, and is now in no position to claim immunity. The controlling issue in this case is whether respondent was defrauded by appellant, and whether appellant knowingly made false representations upon which respondent relied. The evidence upon this issue was properly resolved in the respondent's favor.

The judgment is affirmed.

MOUNT, C. J., PARKER, ELLIS, MORRIS, FULLERTON, CHADWICK, and GOSE, JJ., concur.

[No. 10440. Department One. December 26, 1912.]

METHOW CANAL COMPANY, *Respondent*, v. J. C. BARTON, *Appellant*.[1]

APPEAL—DECISIONS REVIEWABLE—FINALITY — STRIKING DEFENSE. An order striking parts of an affirmative defense but leaving an issue to be tried, is not appealable, since the order did not determine the action or prevent a final judgment, within the meaning of Rem. & Bal. Code, §1716 authorizing appeals.

Appeal from an order of the superior court for Okanogan county, Pendergast, J., entered March 6, 1912, striking parts of defendant's cross-complaint, after a hearing before the court. Dismissed.

C. F. Burton and *E. C. Jennings*, for appellant.

Smith & Gresham, for respondent.

CHADWICK, J.—Appellant filed a lien in the sum of $360, against certain property belonging to respondent situate in Okanogan county. Thereafter respondent began this action, setting up its ownership of the lands charged with the lien; that the amount claimed was not due; that the claim was exorbitant and unjust, and that the lien had been filed for the purpose of embarrassing respondent in the sale of its property; and praying for an order permitting it to pay into the registry of the court an amount sufficient to protect any judgment that might thereafter be rendered, and further, that the cloud upon the real property be removed. Upon citation to show cause, the court ordered and adjudged that respondent be permitted to pay into the registry of the court the sum of $720; that upon so doing, the appellant's lien should be canceled "as to the property and things mentioned and described in said claim of lien, and that said claim of lien be transferred to said deposit, and that said deposit shall be and remain as a substitute for the property men-

[1]Reported in 128 Pac. 627.

tioned in defendant's said claim of lien." Appellant, by his counsel, took exceptions to this order. Thereafter he answered, and by way of affirmative answer and defense, set up his lien upon the property described therein, and asked for foreclosure. Upon motion by respondent, the court struck practically all of the affirmative answer, stripping the issue down to the question of debt only. To this order, exceptions were also taken, and this appeal is prosecuted from the last mentioned order.

A motion is made to dismiss the appeal. This must be sustained. The question of debt is still before the court upon the complaint and answer, and so long as it is, this court will not inquire into the right of the appellant to set up and foreclose his lien. An action cannot be split for the purpose of appeal. The question now submitted to this court may be determined if the case is ever brought here on its merits. The order sustaining the motion to strike did not determine or discontinue the action, nor does it prevent a final judgment. Rem. & Bal. Code, § 1716.

The appeal is premature and is dismissed.

MOUNT, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 10507. Department One. December 26, 1912.]

LAURA BRIGGS TRETHEWEY *et al.*, *Appellants*, v. CAROLINE E. HORTON *et al.*, *Respondents*.[1]

TRUSTS—TESTAMENTARY TRUSTS—MANAGEMENT OF ESTATE—ABUSE OF DISCRETION—LIABILITY OF TRUSTEES—EVIDENCE—SUFFICIENCY. Testamentary trustees are shown to have exercised proper judgment in the execution of their trust, and should not be discharged or held to account for increased interest to certain objecting legatees, where it appears that they were expressly directed not to sacrifice the estate, and to hold and sell a particular business block as one property, that the deceased left but $64,000 cash on hand, while repairs and improvements on the business block were under way which would cost $85,000, besides which there was a charge to pay

[1]Reported in 128 Pac. 632.

legacies amounting to over $367,000, $220,000 of which with annuities aggregating $3,840 a year, besides taxes etc., that to meet this severe problem they incorporated the estate, the residuary legatees accepting stock in lieu of legacies, which earned less than four per cent, that to insure participation by the class of legatees objecting, they executed the several notes of the company for the sums due them, which drew interest at four per cent per annum, payable monthly; and such per cent is found to be a fair return, when men of financial judgment testified to that effect, considering the circumstances; especially where, for a time at least, payment of such interest was a mere gratuity; and such objecting legatees had no right to have their share of the estate invested in the stock of the company.

SAME—DISCRETION—SALE—OBLIGATION OF TRUSTEES. In such case, the testamentary trustees did not abuse their discretion in failing to convert into money real estate, the free use, possession, and enjoyment of which was devised to the wife for life, although she had moved away from the property; since the right to make such use of the proceeds during life is doubtful, and this precludes any abuse of discretion.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered January 2, 1912, in favor of the defendants, in an action for an accounting by testamentary trustees, and for other equitable relief. Affirmed.

Howard Waterman, for appellants.

Frank P. Lewis and *Louis Henry Legg*, for respondents.

CHADWICK, J.—Dexter Horton, a pioneer of the city of Seattle, died testate on July 28, 1904. His estate, which was and is of considerable value, consists principally of a building known as the New York Block, and the annex thereto, called at the time of his death the Seattle Block. His home for many years had been on a lot at the corner of Third and Seneca streets. At the time of his death, Mr. Horton left money to the amount of about $64,000. This and more was consumed by the executors or trustees of his will in completing certain improvements to the real estate, and in moving the Seattle Block back from Third street a distance of nine feet. Both of these buildings, now made into one, were converted into modern office buildings. Mr.

Horton left a widow and two daughters surviving him. There were also three children, the issue of a daughter Rebecca Horton Briggs, theretofore deceased, namely: Laura Briggs Trethewey, Ida Briggs, and Alfred Briggs. The will is very long, and contains so much in the way of detail and specific charges and instructions that we shall not undertake to set it out, but will refer to the items pertinent to our present inquiry in their proper order. The widow was left a bequest in money of $20,000, and a monthly income of $250 per month. One daughter was left $20 per month for pocket change, and $50 per month until her death or marriage, and $100,000. The other daughter was left a bequest of $100,000. The executors and trustees were further directed to care for the issue of his deceased daughter, Rebecca Horton Briggs, in this way: To "set apart the sum of one hundred thousand dollars, and divide the same into three equal parts to be known and designated as 'A', 'B' and 'C', and safely invest the same in safe and sound interest-bearing securities, and use and apply the principal and interest to accrue thereon to the following uses and purposes, that is to say:

"The interest accruing and to accrue on said part 'C' to be paid unto my dear granddaughter Laura Briggs Trethewey the wife of Samuel Trethewey of Seattle (and the sister of Ida and Alfred). If in the judgment of my executors and trustees such interest shall be insufficient for the support of her family, then they are authorized and empowered to use so much of the principal as they shall deem proper and expedient. And if she shall survive me and die leaving child or children surviving her, then and in that event I order and direct my executors and trustees to pay all of the unexpended principal and interest, if any, to her child or children then surviving her, to have and to hold forever; but if my said granddaughter shall die leaving her husband but no child or children her surviving, then and in that event, I order and direct my said executors and trustees to pay to her husband Samuel Trethewey out of said principal the sum of two thousand and five hundred dollars to hold for-

ever; and the balance less any advancements now or hereafter made shall fall into and become a part of my residuary estate."

Other bequests are made in the will aggregating $367,000. The deceased classified his bequests, those going to his widow and two living daughters and the issue of the deceased daughter being of the second and third classes; those to relatives in the collateral line being of the fourth class, and those going to various churches, charitable, benevolent and social organizations being of the fifth class. The will then provides for the order of payment:

"That the legacies and bequests made and specified in the second and third clauses of this will shall stand on terms of equality as one class; and the bequests in the fourth and fifth clauses of this will shall stand on terms of equality as one class; and that each class shall be paid in the order named, at such time or times as my executors and trustees shall in their discretion be able to do without sacrificing my estate and the rights of my beneficiaries."

Aside from these bequests of money, the testator directed that his widow should have the "free use, possession and enjoyment during her natural life, of my family residence, free of cost, charge or expense of rent, repairs, insurance, taxes and assessments (whether such residence be owned or rented)." It remains only to refer to the express directions to, and powers of, the trustees:

"I give, devise and bequeath unto my executors hereinafter named and unto the survivor or survivors of them, as trustees, all of my money, property and estate of what name or nature soever and wheresoever situate, with full and ample power, authority and discretion, as I would have if living, to hold, control and manage, to bargain, sell, convey, mortgage, lease or otherwise manage, control, dispose of, settle and distribute the same or any part thereof or interest, with or without notice, in one or more parcels, at such times and for such prices as in their best judgment shall be deemed for the best interest of my estate, beneficiaries and legatees; and in aid of and to limit and control such power, I order and

direct my executors and trustees to hold the New York Building and the Seattle Building and the lands under and appurtenant thereto as one parcel, and to sell or distribute the same together as one parcel, at such time as in their best judgment they can do so without sacrificing my estate and the interests of my beneficiaries, and I expressly relieve any and all purchasers of any duty or liability as to the proper application of the proceeds or moneys paid to my executors and trustees, all in trust however, to and for the following uses and purposes, that is to say:."

They are directed to pay the legacies, but no time is fixed for their payment. The trustees were, as has been already seen, confronted with a problem severe and important to all concerned in the estate. With about $64,000 cash on hand, repairs and improvements under way which could not be abandoned and which eventually cost $85,000, a charge to pay legacies amounting to over $367,000, $220,000 of which with annuities aggregating $3,840 per year, and taxes, etc., to be paid before these appellants and those named after them had any right to participate at all, and an express direction not to sacrifice the estate and the rights of the beneficiaries, which must be held to include all the beneficiaries and not these appellants alone—the trustees were put to their best judgment. In this predicament they resolved to incorporate the estate. This they did on April 15, 1905. The corporation, though prudently managed so far as we can see, has not returned enough to pay off the several legacies. The residuary legatees have accepted stock in lieu of their legacies. The stock has earned a net return of less than four per cent. In order to insure a right of participation in the estate to the appellants and those in their class, the trustees, at the time of the incorporation, caused to be executed the three several notes of the company, for the amounts then due upon the items "A", "B" and "C". These notes provided for the payment of four per cent interest per annum, payable monthly. Appellants accepted payment of the interest from month to month, until they

began this suit alleging an abuse of trust "in that the trustees have not obeyed the instructions of the will, and that instead of investing the funds in safe and sound securities, they loaned the money of the estate to the Dexter Horton Estate, a corporation, upon an unsecured promissory note, drawing interest at four per cent," and further, that it is the information and belief of the appellants that the trustees have profited personally in the management of the trust fund, both directly in the way of dividends and profits returned, and indirectly in the increase of the value of the property and assets of the corporation. Appellants pray for an accounting; for a judgment "for such sum as the court shall find to be due and owing from said trustees to the plaintiff, Laura Briggs Trethewey; that the trustees be removed; and for their costs and other relief."

To warrant this prayer, which is broader than the complaint and asks more than the will warrants, appellants endeavored to prove: That the trustees were paying only four per cent, whereas money invested in "safe and sound interest-bearing securities" would have returned six per cent to seven per cent; that the trustees led plaintiffs and their attorneys into the false belief that the fund set apart for their benefit had been invested in the stock of the company, or that stock had been issued to cover the amount, and that they would, and were, receiving as much as other stockholders. One or two other matters run in and out of the testimony, but we agree with the opinion the trial judge expressed on the trial, that the only question is whether the trustees have exercised proper judgment under the will. Have they deprived appellants of a right or put them in a worse situation than they would have been otherwise? Conceding that there was an imperative duty to convert the estate into money and to carry out the ultimate intent of the will, it must be admitted that the trustees, in the interest of all concerned, would have a reasonable time to do so, and having done so, it would be then their duty to invest appellants' share and pay them the

interest thereon. Surely, under the facts detailed, from August, 1904, to April, 1905, was not an unreasonable time. Therefore, the only question remaining is whether four per cent annual interest, payable monthly, was a fair return. Men of financial judgment and reputation have testified that, considering the facts of this case, the return is not to be condemned. There is testimony tending to show that the rate of interest paid on the note was equal to, if not greater than, the net return on the stock of the corporation. Appellants were satisfied so long as they believed that what they called their share in the estate was invested in the stock of the company. It would seem that in equity they cannot now complain because it was not so invested. They must have known that the trustees had no authority to so invest it, or if they had, that appellants would have no present interest in the principal, but only in its earnings.

We have followed the argument of counsel for appellants as he has presented it; that is, that there was a fund that might have been used or invested under the item "C" of the will, as hereinbefore quoted. As will be seen, there was no fund. The trustees have, notwithstanding, paid interest from within six months after the death of the testator; whereas they might have taken a year or two, under the testimony, to dispose of the estate without being subject to the charge of taking an unreasonable time. Therefore, the payment of so-called interest was, for a time at least, a mere gratuity; and when considered for the whole time, deducting a reasonable time for the investment of the money, if it had been on hand, we think that four per cent, payable monthly, is as much as appellants would have realized if the trustees had taken time to convert the property into money and invest it at a higher rate. It was stated in the oral argument that, since the trial of this action, the trustees have, upon the suggestion of the trial judge, borrowed enough money upon the credit of the estate to make the fund provided under items "A", "B" and "C" of the will, and that it has been

invested so as to draw a current rate of interest. While probably not bound in law or in equity to do this, the fact that it has been done indicates to our minds a disposition on the part of the trustees to deal fairly and justly with appellants, and in our judgment the record bears out the findings of the trial judge, that they have been true to the trust reposed in them and have done nothing to deprive appellants of any legal right.

Counsel contends that the trustees should have sold the residence property on Third and Seneca streets, the widow having moved away from it, and that it is business property of the probable value of $250,000. We think that a failure to convert this property into money could not be charged as a delinquency on the part of the trustees. There is a very substantial question of law that might confront the trustees if they undertook to use the proceeds of such sale to pay legacies in the lifetime of the widow, and the law, as we understand it to be in such cases, is that a trustee will not be charged with abusing his discretion if his right to act is reasonably doubtful.

The decree of the lower court is affirmed.

MOUNT, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 10662. Department One. December 26, 1912.]

JOHN NICOL, *Respondent*, v. OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, *Appellant*.[1]

RAILROADS—ACCIDENTS AT CROSSINGS—PLEADING AND PROOF—VARIANCE. It is an immaterial variance that the complaint alleged that the defendant's engineer saw plaintiff's automobile stalled on a crossing in time to have stopped the train, and the proof showed that had the engineer been keeping a proper lookout, he could have seen plaintiff's signals, as he ran down the track to give warning, in time to have stopped the train and avoided the collision.

[1]Reported in 128 Pac. 628.

SAME—CONTRIBUTORY NEGLIGENCE. It is contributory negligence for a driver of an automobile, on a bright night with all the lights on his machine lighted, to drive off a 16-foot planking at a railroad crossing and stall his car near the cattle guards.

SAME—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE—EVIDENCE—SUFFICIENCY. In an action for damages to an automobile, negligently stalled on a railroad crossing in a public highway, the railroad company is liable under the doctrine of the "last clear chance," and the engineer is guilty of negligence, where it appears that the night was clear and a man on the track could have been seen a distance of 1,200 feet, and the train stopped within 1,000 feet without an emergency stop, that the plaintiff ran down the track lighting matches and waving his hands, in the rays of the headlight, giving the engineer 1,500 feet in which to stop the train had he been keeping a proper lookout.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 4, 1912, upon findings in favor of the plaintiff, after a trial on the merits before the court, in an action in tort. Affirmed.

Bogle, Graves, Merritt & Bogle and *Sullivan & Christian*, for appellant.

Myron C. Cramer, B. S. Grosscup, and *W. C. Morrow*, for respondent.

GOSE, J.—This is an action for damages against the defendant, a common carrier, for an alleged negligent destruction of plaintiff's automobile at a country crossing. The case was tried to the court. Findings were made in favor of plaintiff, and a judgment was entered thereon, from which the defendant has appealed.

The negligence charged is that, while the respondent was in the act of driving his automobile over the railroad crossing in a public highway, the machine became stalled crosswise of the track, the engine of the machine stopped running, the respondent was unable to start it or to move the machine off the track, and "the engineer and fireman in charge of defendant's said train saw the plaintiff before the train got to him, and saw his automobile standing upon the

crossing in sufficient time to have stopped said train and to have avoided colliding with and destroying plaintiff's automobile." The appellant joined issue on the charge of negligence, and pleaded that the collision resulted from the negligence of the respondent. The collision occurred about one o'clock in the morning.

The court did not find, and the evidence does not show, that the engineer actually saw the machine. The court's findings in this respect are that, when the respondent found that he could not extricate his machine, he ran north along the track and right of way toward the approaching train, a distance of 650 or 700 feet, lighting matches, waving his arms, and shouting to signal the engineer in charge of the train, and that, had the engineer been keeping a proper lookout ahead, he would have seen the respondent, who, while running down the straight track, was in plain view of the engineer in the rays of the headlight of the engine for at least 1,000 feet before the engine passed him, and would have seen his signals in time to have stopped the train before striking the machine.

The first point urged is that there is a variance between the pleadings and the evidence, and that the findings are not within the issues. The variance is immaterial. Rem. & Bal. Code, § 1752; *Irby v. Phillips*, 40 Wash. 618, 82 Pac. 931; *Richardson v. Moore*, 30 Wash. 406, 71 Pac. 18.

The further consideration of the case necessitates a statement of the essential facts. The train which struck the automobile was a passenger train composed of nine cars, and was traveling from Tacoma in a southerly direction, at a speed of thirty-five to thirty-eight miles an hour. The engine was equipped with a standard electric headlight, burning brightly, and lighting the track so that an object thereon could be seen on a bright night a distance varyingly estimated by the locomotive engineers at from 1,000 to 1,800 feet. The track has a one degree curve for a distance of 200 feet immediately north of the crossing where the accident

happened. From there northward it runs straight for a distance of 4,800 feet. The respondent says that he ran north towards the approaching train, following the center of the track, for about 500 or 600 feet, striking matches and waving his arms, and that he then stepped to the outside of the track and continued running along it a distance of 100 to 200 feet, giving the same signals, at which point he was passed by the train. The engineer says, that he passed him about 500 feet north of the crossing; that he did not see him until the headlight was opposite him, and that he then applied his air, but did not apply the emergency brakes, and that he stopped the train in 1,000 feet. The engineer admitted that he knew that the track was crossed at grade by a public highway at the point where the collision happened. The respondent was returning to Tacoma from the country club, at American Lake, in his machine, the morning of the accident. He was traveling north on the west side of the railroad track. He got on the wrong road, crossed the railroad track, and discovering his mistake, turned and started to recross the track, got off the planking, which was 16 feet wide over the track, and got his machine stalled cross-wise of the track near the cattle guards, as before stated. He says that the night was bright, and that the stars were shining, and that all the lights upon his machine were lighted and in good condition. These facts clearly establish his negligence. *Moore v. Great Northern R. Co.*, 58 Wash. 1, 107 Pac. 852, 28 L. R. A. (N. S.) 410.

The principal fact in dispute was as to whether the night was clear or foggy. The respondent's witnesses asserted the former to be the fact, whilst the appellant's witnesses insisted that the latter was the fact. The court found that "the night was clear, there being no fog to any extent or other atmospheric difficulty to interfere with the engineer's view." We accept the fact as found by the court.

The respondent contends that, conceding his negligence, the negligence had ceased; that appellant owed the duty of

keeping a lookout; that had the engineer exercised reasonable care, he would have seen the respondent and his signals in time to have avoided the collision; and that the appellant is liable under the doctrine of "last clear chance." On the other hand, the appellant earnestly insists that it owed no duty to the respondent, except to not wilfully injure him or his property after *actually* discovering his peril.

We think the respondent has the correct view. His machine was within the public highway; he was in no sense a trespasser, although without the traveled portion of the road. The appellant knew of the presence of the highway, knew that it crossed the track at grade, and knew that it was traveled by the public. Moreover, it was the duty of the engineer to exercise reasonable care, and had he done so, under his own testimony, assuming that the night was clear, he would have seen the respondent and his signals a distance of 1,000 feet or more. This would have given him at least 1,500 feet in which to stop the train, according to his own statement. He testified that he was keeping a lookout ahead, but that the presence of the fog obscured his vision. One of the appellant's witnesses, Mr. Champlain, a locomotive engineer, testified that the engineer could see a man ahead a distance of 1,200 feet on a clear night. In failing to see the respondent and heed his signals, the engineer was clearly guilty of negligence. The act of a man running along a right of way at one o'clock in the morning, striking matches and waving his arms, is a circumstance that ought to attract the attention of a prudent engineer, and it was notice that there was danger ahead.

The doctrine of last clear chance is applied perhaps most frequently to cases where the plaintiff's negligence has terminated, and where the defendant thereafter, in the exercise of reasonable care and owing a duty to exercise it, should have discovered the peril in time to have prevented an injury. It has also often been applied where it would be apparent to one in control of a dangerous agency, if exercis-

ing reasonable vigilance, that a traveler is unconscious of his danger or so situated as to be incapable of self-protection; and in such cases, if the one controlling the agency could have averted the danger by exercising reasonable care and failed to do so, liability follows. It is based upon the principle that the negligence of the one is remote, and that the negligence of the other is the proximate and efficient cause of the catastrophe, he having the last clear opportunity of preventing it. These views find support in the following cases: *Bullock v. Wilmington & W. R. Co.*, 105 N. C. 180, 10 S. E. 988; *Baltimore & O. R. Co. v. Anderson*, 85 Fed. 413; *Southern R. Co. v. Fisk*, 159 Fed. 373; 3 Elliott, Railroads (2d ed.), § 1115; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Turnbull v. New Orleans & C. R. Co.*, 120 Fed. 783; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551; *Southern R. Co. v. Bailey*, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379; *Klockenbrink v. St. Louis, & M. R. Co.*, 81 Mo. App. 351; *Bergman v. St. Louis I. M. & S. R. Co.*, 88 Mo. 678, 1 S. W. 384; *Lloyd v. St. Louis, I. M. & S. R. Co.*, 128 Mo. 595, 29 S. W. 153, 31 S. W. 110.

In the *Bullock* case, the plaintiff's team, drawing a portable steam engine, had become stalled at the crossing of defendant's road in a public highway, and was struck and killed by a passing train It was held that the defendant was guilty of negligence, if the engineer by the exercise of reasonable care could have seen that the road was obstructed, in time to stop his train before reaching the crossing, although he did not in fact see it. Elliott says that a railroad company is liable for an injury inflicted upon a traveler at a railroad crossing, notwithstanding his negligence, where the exercise of reasonable care on its part would have prevented the injury "after it discovered, or ought to have discovered, his danger and inability to take care of himself." In the *Anderson* case, the plaintiff, a boy, while attempting to cross the defendant's track in a street, got his foot caught in an opening between the platform and the rail, and while

in that plight, was injured by a moving train. The trial court assumed that the plaintiff was negligent, and charged the jury that his negligence would not relieve the defendant from liability, if they found that "by due care, the engineer and fireman might have stopped the train after they had seen, or ought to have seen, the position of danger in which the plaintiff, by reason of his negligence, was placed, and could thus have avoided injuring him." The instruction was approved in an opinion written by Judge Taft, wherein he took occasion to say that the plaintiff was one of the public, and that:

"The obligations upon the public and the railroad company at an intersection of the track with a highway are correlative . . . Neither is relieved from the duty of carefully watching the crossing to avoid accidents by the assumption that the other is doing his or its whole duty at such a place;"

and that the same duty was not owed to a trespasser.

In the *Fisk* case, the plaintiff, a boy twelve years of age, was attempting to cross the railroad track at an avenue in a city in the nighttime, and his foot was caught and held in a switch point in the tracks, a few feet without the street. While endeavoring to release his foot and making outcries, he was struck and injured by a train moving backward. The presence of the boy was not discovered by the engineer in time to avoid the infliction of the injury. The court said, that whether the boy was a trespasser was a question of fact for the jury; that while the tracks are a warning to the traveler of railway movements liable to be met, the highway crossing is likewise notice to the operators of engines or cars that travelers upon the highways are to be expected, and that care is exacted commensurate with such knowledge, and that,

"If the plaintiff was unmistakably attempting to cross the tracks upon the street crossing, and his deviation was accidental, as stated in the direct testimony, he was within the

benefits of such crossing rule; for the exercise of reasonable care in the movement of the train, measured by the conditions which were either known or within the observation of the engineer and trainmen, and thus unaffected by the rule as to trespassers."

In the *Ives* case, the plaintiff's intestate was killed by a railway train at a street crossing. One contention was that the deceased was guilty of contributory negligence which was the proximate cause of the accident and exempted the defendant from liability. Speaking to this question, the court said:

"The contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

In the *Bergman* case, the plaintiff's son, a minor eighteen years of age, was killed by a backing train, while walking on the railroad track in the city of St. Louis. The court said that, admitting the negligence of the boy, there should be a recovery "if the defendant either knew, or might by the exercise of ordinary diligence have known, of his dangerous position on the track in time to have prevented the accident." The same rule was declared in the *Klockenbrink* case, where the plaintiff, while driving his team upon a street, with two wheels of his wagon and one horse between the rails of a street car track, was struck by a car approaching from behind. In the *Lloyd* case, the plaintiff's husband was run over and killed by the defendant's train, while standing upon a public crossing on the side track at a station talking with an acquaintance, and a like rule was declared. The subject is exhaustively considered and the authorities reviewed in *Southern R. Co. v. Bailey, supra.* As a result of such analysis, the court said:

"If, however, it appears that those in control of a train, in the discharge of their admitted duty to keep a reasonable outlook, discover, or should have discovered, a person upon the track, and there be superadded any fact or circumstance

brought home to their knowledge, sufficient to put a reasonable man upon his guard, that the person upon the track pays no heed to his danger and will take no step to secure his own safety, then the situation changes and the negligence of the person injured becomes the remote cause or mere condition of the accident, and the negligence of the railroad company the proximate cause, and there may be a recovery."

The engineer testified that he stopped the train, after seeing the respondent, in a distance of 1,000 feet, and that he could have made an emergency stop in 700 or 900 feet. The locomotive engineers who testified for the respondent said that the particular train could have been stopped in an emergency in a distance of 600 feet. The engineer had a right to exercise his best judgment as to whether the conditions which confronted him demanded an emergency stop (his first and highest duty being owed to the passengers), and the appellant could not be held liable for an error of judgment made under such circumstances. We place the liability upon the ground that (as the court found) the respondent, while running down the "straight track," was in plain view of the engineer, in the rays of the headlight, for at least 1,000 feet before the engine passed him. This being true, if the engineer had been keeping a proper lookout—and all the appellant's expert witnesses testified that all prudent engineers keep a constant lookout ahead—he would have seen the respondent and would have seen his signals, and in view of the lateness of the hour and the proximity of the highway crossing, it was his duty to heed the signals. We have found no case involving facts similar to those present in this case, but we think the case readily accommodates itself to the principles announced in the authorities which we have reviewed.

The cases cited by the appellant may be divided into three principal classes. In the first class, the negligence of the injured party had not ceased, but continued up to the point

of contact. *Austin Dam & S. Co. v. Goldstein*, 18 Tex. Civ. App. 704, 45 S. W. 600; *Smith v. Houston & T. C. R. Co.*, 17 Tex. Civ. App. 502, 43 S. W. 34; *Stewart v. Portland R. Light & Power Co.*, 58 Ore. 377, 114 Pac. 936, and *Bourrett v. Chicago & N. W. R. Co.*, 152 Iowa 579, 132 N. W. 973, 36 L. R. A. (N. S.) 957, fall within this class. The decision in the *Stewart* case was by a divided court. The minority were of the opinion that the negligence of the plaintiff had culminated before the injury, and hence that if the defendant by exercising ordinary care could have discovered his peril and prevented the injury, it was liable for not having done so.

In the second class, the person or property injured was trespassing upon the defendant's right of way at a point without a public highway. *Lake Erie & W. R. Co. v. Weisel*, 55 Ohio St. 155, 44 N. E. 923; *Dull v. Cleveland, C. C. & St. L. R. Co.*, 21 Ind. App. 571, 52 N. E. 1013; *Camden, G. & W. R. Co. v. Young*, 60 N. J. L. 193, 37 Atl. 1013; *San Antonio Traction Co. v. Kelleher*, 48 Tex. Civ. App. 421, 107 S. W. 64; *Hoffman v. Missouri Pac. R. Co.*, 24 Mo. App. 546; *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506, 79 Pac. 32; *Matson v. Port Townsend Southern R. Co.*, 9 Wash. 449, 37 Pac. 305; *Reynolds v. Northern Pac. R. Co.*, 22 Wash. 165, 60 Pac. 120; *Hamlin v. Columbia & Puget Sound R. Co.*, 37 Wash. 448, 79 Pac. 991; *Shaw v. Missouri Pac. R. Co.*, 104 Mo. 648, 16 S. W. 832; *Eastern Kentucky R. Co. v. Powell*, 17 Ky. Law 1051, 33 S. W. 629.

In the third class, the plaintiff, being upon the defendant's premises without an invitation either express or implied, stepped into an unguarded post hole, and was held to have been a trespasser. *West v. Shaw*, 61 Wash. 227, 112 Pac. 243. In these cases it was held that the defendant owed no duty to the plaintiff until his peril was discovered.

We think the judgment is right, and it is affirmed.

Mount, C. J., Crow, Parker, and Chadwick, JJ., concur.

[No. 10471. Department One. December 27, 1912.]

J. W. Kleeb, *Appellant*, v. A. J. McInturff *et al.*, *Respondents*.[1]

Trial—Right to Open and Close—Damages—Evidence—Burden of Proof. Where the only issue on a counterclaim was the defendants' measure of damages in the sale of a horse, to be determined by the difference between the price paid and its actual value, the burden of proof is upon the defendants, with the right to open and close.

Appeal—Decision—Remand—Effect—Issues on Second Trial. In an action for rescission of a trade of land for a horse, on a second trial the issue is properly restricted to the single issue as to the value of the horse, where, on appeal, the supreme court remanded the case for determination of that question only; and evidence as to the value of the land is properly excluded.

Interest—Insufficient Tender. Where a tender was insufficient in amount, interest is recoverable on the amount due.

Tender—Deposit Without Authority. Where plaintiff in an action for specific performance did not tender the full amount due to defendants, but deposited the same with a third party without authority from the defendants, such person is plaintiff's agent, and judgment for the deposit is properly given against the plaintiff, in case the agent fails to pay over the money.

Appeal by plaintiff from a judgment of the superior court for Franklin county, Holcomb, J., entered January 4, 1912, upon the verdict of a jury rendered in favor of the defendants on a counterclaim, in an action for specific performance. Affirmed.

Chas. E. Miller and *Herman Murray*, for appellant.

H. B. Noland and *Moulton & Henderson*, for respondents.

Crow, J.—This action, brought to compel specific performance of a contract for the sale of real estate, has heretofore been in this court (*Kleeb v. McInturff*, 62 Wash. 508, 114 Pac. 184, 116 Pac. 627), and a statement of the issues may be found in our former opinion. We then said:

[1]Reported in 128 Pac. 1076.

"The defendants did not offer to rescind upon discovering that the horse was not a registered one, but seek to retain the horse and recover damages. We think they may rightfully do this, and that their measure of damages is the difference between $1,500, which they paid for the horse, and the actual value of the horse at the time of the contract. The cause is remanded to the lower court to determine this question, and to enter a decree accordingly."

The law of the case was then settled, and the only issue to be tried after remittitur was the difference between $1,500, and the actual value of the horse at the date of the contract. Upon the trial of this issue, a verdict was returned, fixing the value at $675. Thereupon judgment was entered in favor of the defendants McInturff for $825, as damages. The amended complaint alleged, and it is conceded, that prior to the first trial, the plaintiff tendered $320.37 in cash to the defendants McInturff and wife, in full payment of the remainder of purchase money for the land; that plaintiff then demanded possession of the deed, which had been deposited with the defendant W. T. Anderson; that the defendants McInturff and wife refused the tender, and that thereupon the plaintiff deposited the $320.37 with Mr. Anderson, to be paid to McInturff and wife upon delivery of the deed to plaintiff. At the time of the last trial, the money thus deposited was still in Anderson's possession, although then due the defendants, and in the final judgment the trial court, in addition to awarding $825 as damages, further ordered:

"That the defendant W. T. Anderson forthwith pay into Court the amount of money deposited in his hands by the plaintiff, J. W. Kleeb, amounting to the sum of Three Hundred and Twenty and 37-100 ($320.37) Dollars, and in the event of the failure of the defendant, W. T. Anderson, so to do, judgment shall be entered against plaintiff J. W. Kleeb, for the said sum of Three Hundred Twenty and 37-100 ($320.37) Dollars. That the defendants McInturff have judgment against plaintiff, J. W. Kleeb, in the premises for interest on the sum of Three Hundred and Twenty and

87-100 ($320.87) Dollars from and after December 1st, 1908, to the date of this order, at 7% per annum."

From the final judgment thus entered, the plaintiff has appealed.

After remittitur, the only question to be tried was the value of the horse, in order that defendants' damages, if any, might be determined. Appellant's first contention is, that the trial judge erred in holding that respondents McInturff and wife had the burden of proof, and were entitled to open and close the case. In the absence of any evidence, the agreed price of the horse would be accepted as its true value, and no judgment for damages to respondents could have been awarded. It was necessary for respondents to introduce evidence of the value of the horse in support of their claim for damages. This being true, the burden of proof was upon them.

Appellant further contends that the trial court, in ruling on the admissibility of evidence and in instructions given and refused, erred in the measure of damages adopted; that, as a trade for the land was being made, evidence should have been admitted to show the actual value of the land, and that if it could be made to appear that $3,300, the agreed price, was excessive, that fact should be considered in measuring any damages the respondents might have sustained. There is no merit in this contention. The trial judge properly restricted the evidence to the value of the horse, as directed by this court.

Appellant further contends that no judgment should have been entered against him for the $320.87 deposited with the defendant Anderson. In view of the damages proven, it is manifest that appellant did not tender the entire amount then due. When he deposited the $320.87 with Anderson, he did so without authority from respondents. Anderson then became appellant's agent or depositary and should he fail to pay the money to respondents as ordered, they would be en-

titled to judgment against appellant therefor. They are also entitled to recover interest as ordered.

Other assignments of error we find to be without merit. The only issue to be determined, on the last trial, the value of the horse, was fairly tried without error.

The judgment is affirmed.

MOUNT, C. J., GOSE, CHADWICK, and PARKER, JJ., concur.

[No. 10444. Department One. December 27, 1912.]

BANK OF COMMERCE, *Appellant*, v. CHARLES P. NEWBERRY, *Respondent*.[1]

APPEAL—REVIEW—DISCRETION—NEW TRIAL. The supreme court will not interfere with the discretion of the trial court in granting a new trial for insufficiency of conflicting testimony, except for clear abuse of discretion.

EVIDENCE—PRODUCTION OF BOOKS. A foreign bank cannot, by demand for production of papers, be required to bring into court its books essential in the daily conduct of its business.

Appeal from an order of the superior court for Yakima county, Preble, J., entered January 22, 1912, granting a new trial, after findings in favor of the plaintiff, in an action on contract. Affirmed.

Roberts & Udell and *Fred E. Butler*, for appellant.

Ralph B. Williamson and *Robert N. Denham, Jr.*, for respondent.

CHADWICK, J.—After a trial upon the merits, the court announced that he would make findings and conclusions in favor of the plaintiff. Thereafter a motion for a new trial was entertained. The motion was based upon several statutory grounds, including the following: That there was an error in the assessment of the amount of recovery allowed

[1]Reported in 128 Pac. 1064.

plaintiff, in that it was greater than any sum proven upon the trial; that the evidence adduced at the trial was not sufficient to justify the decision; and that the decision is contrary to law. Other grounds were urged in the motion, but we will not consider them. The court, after taking the case under advisement for some time, granted the motion for a new trial upon all the grounds urged therein; and plaintiff has appealed to this court.

The real issue in the case is whether or not the respondent Newberry is bound to the full extent of a promissory note, signed by him and one Utley and made payable to the appellant. We have read the testimony carefully, and we believe that there may well have been a doubt in the mind of the trial judge, and that in the exercise of his discretion he believed that the disputed issues of fact might be made clearer upon a new trial. In the case of *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175, we undertook to collect the cases in which this court had sustained the trial court where new trials had been granted upon conflicting evidence. We there said:

"Appellant contends that, inasmuch as there was evidence to sustain the verdict, the judgment should stand. It is the particular province of the trial judge to pass upon the weight of the testimony, being himself an actor in the trial, and in position to measure the personalty of the witnesses. And unless the evidence be undisputed, or it appears that there has been a clear abuse of discretion, an appellate court cannot review his order when made to rest upon the ground of insufficiency of evidence. We may grant that the evidence in this case is conflicting, but it is such conflict that calls for the rule as we have stated it, and this court has consistently affirmed the judgment of trial courts in all such cases."

In *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88, we reaffirmed our disposition to adhere to the positive rule, that we will not interfere with the discretion of a trial judge in granting a new trial unless we are certain that the discretion has been abused, saying:

"We have held by an unbroken line of decisions that a motion for a new trial is necessarily addressed to the sound discretion of the trial court, and when the motion has been granted for insufficiency of evidence the order will not be disturbed unless the evidence is undisputed or the discretion has been clearly, and as said in one case, grossly abused."

See, also, *Taylor v. Spokane, Portland & S. R. Co.*, 67 Wash. 96, 120 Pac. 889; *Holloway v. Savage*, 68 Wash. 614, 123 Pac. 1021; *Jones v. Spokane, Portland & Seattle R. Co.*, 69 Wash. 12, 124 Pac. 142; *Loy v. Northern Pac. R. Co.*, 68 Wash. 33, 122 Pac. 372.

One of the reasons moving the trial judge to grant a new trial was that respondent had served notice on the attorneys for the appellant to produce all the books and papers pertaining to the transaction. The bank is doing business at Lewiston, Idaho, and the trial occurred at North Yakima. In so far as the court treated this question, he was wholly in error. No sufficient demand was made, nor was any continuance asked in order to secure the evidence. Aside from this, a bank should not be put to the necessity of bringing its books from a foreign jurisdiction. Wigmore, Evidence, § 1223; *People v. Hurst*, 41 Mich. 328, 1 N. W. 1027. We may assume that the books are essential to the every day business of a way-going bank, and that the depositors and patrons have an interest therein. There is a way to get such evidence either by deposition or by stipulating the accuracy of an account showing the entries. In the event of a retrial, the court will not compel the physical production of the books.

The judgment is affirmed.

MOUNT, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 10281. Department One. December 27, 1912.]

WILL H. MERRITT *et al.*, *Respondents*, v. AMERICAN CATERING COMPANY, *Appellant*.[1]

FRAUDS, STATUTE OF—EMPLOYMENT OF BROKER—SALE OF PERSONALTY—TRADE FOR LAND. A contract to pay a commission on the sale of a cafe, being for the sale of personal property, is not within the statute of frauds (Rem. & Bal. Code, § 5289), requiring an agreement employing an agent to sell or purchase real estate to be in writing, notwithstanding that the owner agreed to take part or all of his price in land, and the agent effected a trade of the cafe for land, which was consummated.

BROKERS—CONTRACT FOR COMMISSIONS—PERFORMANCE. Brokers who procured a purchaser to whom a sale was made through continuous negotiations covering 12 days, cannot be deprived of their commissions by an attempted discharge because of their inability to secure a loan by which the deal was to be consummated, where the owner himself procured the loan and consummated the deal, on terms somewhat different from those originally contemplated.

Appeal from a judgment of the superior court for King county, Yakey, J., entered December 9, 1911, upon findings in favor of the plaintiffs, in an action on contract, after a trial to the court. Affirmed.

Farrell, Kane & Stratton, for appellant.

John E. Humphries and *William A. Johnson*, for respondents.

PARKER, J.—This is an action to recover compensation claimed by the plaintiffs to be due them as commission upon a sale of the defendant's cafe, for which they found and produced a purchaser, in pursuance of an agency contract existing between them and the defendant. The cause was tried by the court without a jury, resulting in findings and judgment in favor of the plaintiffs, from which the defendant has appealed.

In December, 1910, and for some time prior thereto, respondents were engaged in selling property, both real and

[1]Reported in 128 Pac. 1074.

personal, for others upon commission, doing business under the firm name of "Merritt Realty Company." In November, 1910, appellant entered into an oral contract with respondents, as its agents, to sell its cafe, situated in the city of Seattle, for the sum of $30,000, agreeing to pay respondents therefor a commission of $1,000. Thereafter, about December 1, 1910, respondents found and produced a purchaser who was ready, able, and willing to purchase the cafe at the price of $30,000, and upon terms acceptable to appellant. Thereafter on December 12, 1910, a sale of the cafe was made by appellant to the purchaser so produced by respondents, at an agreed price of $30,000, and as payment therefor appellant accepted from the purchaser real and personal property of the agreed value of $30,000. This is the substance of the findings made by the trial court, from which it concluded that respondents were entitled to judgment against appellant for $1,000, and judgment was so rendered accordingly.

Counsel for appellant first contend that the trial court erred in finding that the contract was not one authorizing respondents to find a purchaser for its cafe, but that it was one authorizing respondents to find for it wheat land in British Columbia or Washington, with a view to paying for such land by exchanging the cafe therefor; and they argue that respondents cannot recover any commission because the contract was not in writing, as required by Rem. & Bal. Code, § 5289, providing that an agreement authorizing or employing an agent to sell or purchase real estate for compensation must be in writing. It appears from the testimony that, when the agency contract was made, appellant fixed the price of its cafe at $30,000, and informed respondents that it would exchange the cafe for land of equal value, and would, if necessary, pay $10,000 or $15,000 in addition, if a tract of land acceptable to it of that additional value should be offered in exchange. It is also a fair inference from the testimony that appellant would accept $30,000 in cash for the cafe, though

apparently little thought was given to the possibility of a cash sale of the cafe. The testimony is practically without conflict on these questions, and we think this is a fair summary of the facts appearing therefrom. Appellant concedes that in law the deal contemplated in the beginning, and also as finally consummated, was a sale of the respective properties, though each was simply exchanged for the other. The fact that the properties were each taken in exchange at a fixed money value makes the transfer of each a sale in law. Tiedeman, Sales, § 12; *Picard v. McCormick*, 11 Mich. 68; *Thornton v. Moody* (Tex. Civ. App.), 24 S. W. 331. We are of the opinion that the trial court was not in error in finding that respondents were authorized to find a purchaser for appellant's cafe, though it was expected that the purchase price would be paid in property instead of money; and the cafe being personal property, the agency contract was not within our statute of frauds.

It is next contended that the trial court erred in finding that respondents found and produced a purchaser who was ready and willing to purchase the cafe, and who did purchase it as the result of respondents' efforts. This also presents a question resting upon testimony in which there is practically no conflict. About December 1, respondents found and produced a Mr. Corkery, who owned a ranch of about 15,000 acres lying partly in Umatilla county, Oregon, and partly in Walla Walla county, Washington, which he valued at $30,000, and which he was willing to exchange at that price for property of equal value in Seattle. The parties were brought together by respondents, and each inspected the property of the other about the 1st or 2nd of December, and very soon thereafter arrived at a tentative agreement for the exchange of their respective properties, each at an agreed value of $30,000. Mr. Corkery then informed appellant and respondents that it was necessary that he raise about $5,000, in order to pay off his debts in Eastern Washington before leaving there and coming to Seattle, and gave them to under-

stand that he could not make the exchange unless he could procure a loan of about that amount. Respondents then made some effort to procure a loan for Mr. Corkery, but did not succeed in doing so. However, appellant did procure a loan for Mr. Corkery of $3,300, and the exchange was immediately thereafter consummated on December 12. When it became apparent that respondents were probably not going to be able to procure a loan for Mr. Corkery, appellant, very shortly prior to December 12, informed respondents that, if they did not immediately procure a loan for Mr. Corkery, they would be considered out of the deal, evidently meaning that they would not be paid any commission for their services in producing Mr. Corkery as a prospective purchaser of the cafe. It is evident that the exchange as finally made was the result of negotiations which had been continuous from the time respondents produced Mr. Corkery as a prospective purchaser up until the final consummation of the exchange. It seems to us that, in view of the fact that Mr. Corkery was found and produced by respondents, that the exchange was actually made between appellant and Mr. Corkery, and that it was the result of continuous negotiations from the time the parties were brought together by respondents until the final exchange on December 12, covering a period of only 12 days, appellant cannot be heard to say that respondents did not perform their contract, nor that their rights were terminated by the attempted discharge on the part of appellant before the exchange was finally consummated. In the early case of *Knox v. Parker*, 2 Wash. 34, 25 Pac. 909, Justice Stiles, speaking for the court, said:

"If, at the time of the revocation, the agent should have a pending treaty with a proposing purchaser, who afterwards, by a continuance of the same negotiations with the principal himself, actually buys the property, the agent would have fully earned his commission, since the principal in such a transaction cannot arbitrarily cut off the agent's authority, in the midst of what would be a successful agency, and then,

although himself taking advantage of the agent's services, refuse him compensation."

Nor does the fact that the sale may have been consummated upon negotiations directly between appellant and Mr. Corkery, upon somewhat different terms from those originally contemplated, affect the right of respondents to commission, in view of the facts we have noted. *Barnes v. German Sav. & Loan Soc.*, 21 Wash. 448, 58 Pac. 569; *Norris v. Byrne*, 38 Wash. 592, 80 Pac. 808; *Elmendorf v. Steel*, 70 Wash. 38, 126 Pac. 52; 19 Cyc. 249.

Counsel for appellant rely upon our decision in *Frink v. Gilbert*, 53 Wash. 392, 101 Pac. 1088. That case, however, we think is distinguishable from this, in that there the original negotiations initiated upon the production of the prospective purchaser by the agent entirely ceased and were abandoned, and soon thereafter independent negotiations were instituted between the same prospective purchaser and the seller at the instance of another agent. Plainly the production of the prospective purchaser by the first agent was not the procuring cause of the sale, and he therefore could not recover commission therefor.

We conclude that the learned trial court properly disposed of the rights of the parties, and that its judgment should be affirmed. It is so ordered.

MOUNT, C. J., CHADWICK, and CROW, JJ., concur.

[No. 10535. Department One. December 27, 1912.]

JENS GORDON, *Appellant*, v. BALLARD LUMBER COMPANY, *Respondent*.[1]

MASTER AND SERVANT—METHODS OF WORK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. An employee assisting in loading lumber by attaching skidding tongs to timbers, is guilty of contributory negligence, as a matter of law, precluding recovery for injury to his hand, drawn into a block when he took hold of the wrong cable to slacken it, where, if he had looked he could have seen that it was the wrong cable, and would not have been injured but for his own mistake.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 2, 1912, upon withdrawing the case from the jury, dismissing an action for personal injuries sustained by an employee in a sawmill. Affirmed.

Martin J. Lund, for appellant.

Ballinger, Battle, Hulbert & Shorts, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries, which the plaintiff alleges resulted to him from the negligence of the defendant while he was in its employ, assisting in loading lumber upon a flat car from a platform at defendant's sawmill, in Ballard. At the close of the plaintiff's evidence introduced upon the trial, the court withdrew the case from the jury and rendered judgment in favor of the defendant, upon the ground that the plaintiff's injuries were the result of his contributory negligence. From this disposition of the case the plaintiff has appealed.

The controlling facts bearing upon the question of appellant's contributory negligence may be summarized as follows: At the time appellant was injured, he had been employed by respondent about ten days. He is a Norwegian, and his knowledge of English is so deficient that it was necessary to give his testimony through an interpreter. He was some-

[1]Reported in 128 Pac. 1053.

what inexperienced in the work he was then doing; otherwise, he is apparently a man of average intelligence, and seems to have fully understood the danger attending the act which respondent's attorney claimed constituted his contributory negligence. He is forty-one years old. As the sawed lumber comes from respondent's mill, it is placed upon a platform adjoining a railway track, for loading upon cars. A derrick is maintained by respondent and used for loading lumber upon cars from this platform. The power is supplied by an engine situated some 25 feet from the foot of the derrick. From the engine a cable runs through blocks at the foot and top of the mast of the derrick and the outer end of the boom, from where it falls and runs through a block to which tongs are attached, then back through another block near the outer end of the boom, from where it again falls to the lower block to which it is made fast. Thus there are three lengths of the cable running from the block at the outer end of the boom down to the lower block to which the tongs are attached. These tongs are such as Webster's New International Dictionary terms "skidding tongs," and they grapple an object in the same manner as ordinary ice tongs.

It was the duty of appellant to attach the tongs to lumber upon the platform; when, upon signal, the power would be applied to the cable, the lumber hoisted, and the boom swung around to where the lumber would be lowered into place upon the car. At the time of his injury, appellant had attached the tongs to a large sawed timber preparatory to hoisting it, when one of the workmen noticed that the tongs were not attached to the proper place on the timber, and called appellant's attention to it. Appellant then attempted to change the tongs, and in doing so, it was necessary to slacken the cable. For that purpose he took hold of the cable with a view to pulling it back through the lower block, which he could have done with safety if he had taken hold of the cable on that side of the block where the cable runs away from it when the power is applied; but he took hold of the cable on that side

where it runs towards and through the block when the power is applied. While he had hold of the cable in this manner, the power was applied to the cable and appellant's hand pulled into the block and severely injured.

A drawing of the tackle, made by appellant himself, which quite plainly shows the blocks at the outer end of the boom and the three lengths of the cable falling therefrom to the lower block, renders it quite plain that the safe and proper place to take hold of the cable to slacken it could be ascertained at a glance. It is also plain that, not only was it dangerous to take hold of the cable as appellant did, but he could not by pulling upon the cable at that point slacken it, as pulling by such a hold would have the opposite effect. Bearing upon appellant's knowledge of the danger attending the taking hold of the cable as he did, he testified as follows:

"Q. How far was your hand from the block when you had hold of the cable? A. About five or six inches. Q. When the power was put on and they started to hoist that pulled your hand into the block? A. Yes. Q. So that if you had taken hold of the right rope when the derrick started to pull, it would have pulled your hand away from the block, wouldn't it? A. Yes. Q. So you made the mistake in grabbing hold of the wrong line, didn't you? A. When you are stooping over and making a grab it is hard to pick the right rope. Q. But if you had looked up there, overhead, you could have seen the right one? A. Yes, if I had. Q. When you got hold of the wrong one, why did you hold on to it? A. I was going to get slack. Q. The reason you did not take hold of the right rope was because you did not look to see which one you did take hold of? A. I did not happen to look up—I thought I had the right one. Q. You knew the one that you took hold of would be the one that would pull through the block if the hoist started? A. Yes, if I had looked up. Q. If you had looked you would have known that your hand was on the cable that might carry your hand into the block? A. Yes, I would have seen it if I had looked. Q. If you had not made that mistake, you would not have been hurt, would you? A. If I had got hold of the other I would not have been hurt."

It seems to us that appellant's own testimony conclusively shows that he was guilty of contributory negligence. He even went further than merely choosing a dangerous method when a safe one was open to him, for he chose a method to slacken the cable which under no circumstances could have become effective, since the taking hold of the rope as he did, had he succeeded in pulling it and the power had not been applied, would have raised the tongs instead of lowering them as it was necessary to do in order to attach them at another place on the timber. The principle upon which the following cases were decided by this court we think supports this view: *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981; *Laidley v. Musser Lum. & Mfg. Co.*, 45 Wash. 239, 88 Pac. 124; *Bundy v. Union Iron Works*, 46 Wash. 231, 89 Pac. 545; *Ryan v. Northern Pac. R. Co.*, 53 Wash. 279, 101 Pac. 880; *Frengen v. Stone & Webster Eng. Corp.*, 66 Wash. 204, 119 Pac. 193.

The majority opinion in the last cited case does not seem to rest upon the theory of contributory negligence, though Justice Ellis concurs solely upon that ground. The manner in which the plaintiff in that case took hold of the cable was almost identical with that here involved. Counsel for appellant place their principal reliance, so far as the question of contributory negligence is concerned, upon the decision in *Dossett v. St. Paul & Tacoma Lum. Co.*, 40 Wash. 276, 82 Pac. 273. We think, however, that case may be distinguished from this, in that there was some evidence there to the effect that it was customary to do the act which the plaintiff there did, which act was relied upon by the mill company as contributory negligence on the part of the plaintiff. Under the circumstances shown, the court was of the opinion that it became a question for the jury. We are of the opinion that undisputed facts here shown by appellant's own testimony conclusively show that his contributory negligence was such as to prevent his recovery in this case.

We conclude that the judgment of the learned trial court must be affirmed. It is so ordered.

MOUNT, C. J., CHADWICK, and CROW, JJ., concur.

[No. 10692. Department One. December 27, 1912.]

GEORGE SOUTHARD, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

CARRIERS—STREET CARS—NEGLIGENT OPERATION. The negligence of a motorman in attempting to pass an auto truck so dangerously near the track that a passenger in an open compartment was struck by the corner of the truck, is for the jury; especially in view of the degree of care owed to passengers.

Appeal from a judgment of the superior court for King county, Myers, J., entered February 8, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger on a street car. Affirmed.

James B. Howe and *H. S. Elliott*, for appellant.

Vince H. Faben, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries which the plaintiff alleges he received while he was a passenger on one of the defendant's street cars in Seattle, as the result of the negligent operation of the car. Verdict and judgment were rendered in favor of the plaintiff, from which the defendant has appealed.

The contentions of appellant are, in substance, that no actionable negligence on its part was shown by the evidence, and that the trial court erred in denying its motion for judgment notwithstanding the verdict. Appellant's car, upon which respondent was a passenger, had three compartments, an enclosed one in the middle of the car and an open one at

[1]Reported in 128 Pac. 1063.

each end. Respondent was seated in the forward open compartment on a seat running lengthwise of the car, facing out and near the right-hand side of the car. His feet and knees came near, or possibly slightly over, the edge of the floor of the car. He was a city salesman for a Seattle manufacturing concern, and his attention was upon his order book which he was examining when, not knowing of any impending danger, he was struck on the inside of his right leg a little below the knee by some part of the left rear corner of an auto truck, which was going in the same direction as the car and very close to it, the rear end of the truck being slightly nearer to the car than the front end. The car was going faster than the truck, and had overtaken it at the time. It is insisted by respondent that the gripman negligently attempted to pass the truck while it was dangerously near the track, while appellant insists that the undisputed evidence shows that the truck was not dangerously near the track, but was far enough away to enable the car to pass with safety to the passengers, had not a large curtain hanging on the side of the truck, which had a heavy stick running along its lower edge, blown out from the truck just at that moment, causing the end of the stick to strike respondent's leg.

We hardly think the evidence is conclusive in showing that appellant was struck by the end of the stick upon the curtain; but even if that be the correct explanation of the accident, we think, in view of all the circumstances, especially the nearness of the corner of the truck to the car, the question of the gripman's attempt to pass the truck being negligence was one for the jury. This view finds support in: *Georgetown & T. R. Co. v. Smith*, 25 App. D. C. 259, 5 L. R. A. (N. S.) 274; *La Barge v. Union Electric Co.*, 138 Iowa 691, 116 N. W. 816, 19 L. R. A. (N. S.) 213; *Faris v. Brooklyn City & N. R. Co.*, 46 App. Div. 231, 61 N. Y. Supp. 670; *Koch v. St. Paul City R. Co.*, 45 Minn. 407, 48 N. W. 191. The fact that respondent was a passenger upon a car of appellant, a common carrier of passengers charged with the highest degree

of care and prudence in protecting him from injury, lends additional support to our conclusion that appellant's negligence under the circumstances here shown was a question for the jury. *Brown v. Seattle City R. Co.*, 16 Wash. 465, 47 Pac. 890.

It follows that the judgment must be affirmed. It is so ordered.

MOUNT, C. J., CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10586. Department Two. December 27, 1912.]

PHIL D. THOMPSON *et al.*, *Respondents*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

ABATEMENT AND REVIVAL—SURVIVAL OF ACTION FOR DEATH—STATUTES—CONSTRUCTION—GENDER OF PRONOUN. Rem. & Bal. Code, § 194, providing that no action for a personal injury to any person occasioning his death shall abate if he have a wife or child living etc., or certain other relations dependent on him for support, is not confined to injuries to male persons, in view of § 144, requiring a liberal construction of the code, and § 148, providing that words importing the masculine gender may be extended to females also; and in view of other sections requiring such extension of the masculine pronoun.

SAME—ACTION FOR DEATH—STATUTES—CONSTRUCTION. Such section is not to be confined to males, as the person upon whom the duty of support devolves.

DEATH—ACTION FOR WRONGFUL DEATH—PROXIMATE CAUSE. Where the immediate cause of a death was pleurisy with effusion, following an accident, the proximate cause of the death was the cause that produced the pleurisy with effusion.

DEATH—EVIDENCE—DEATH CERTIFICATE—FOREIGN STATUTES—PRESUMPTIONS. The presumption that the laws of a sister state are the same as our own, which provide that a death certificate filed with a county auditor shall be *prima facie* evidence of the facts recited, does not make a death certificate filed in a sister state *prima facie* evidence in the courts of this state.

[1]Reported in 128 Pac. 1070.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for personal injuries, revived on behalf of heirs after the death of the plaintiff, error in an instruction that the heirs could recover such a sum as the plaintiff could have recovered if she were alive at present, is cured, when, upon objections made, it was explained to cover only such pain and suffering as the plaintiff suffered up to the time of her death.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. In an action for personal injuries, revived in favor of heirs upon the death of the plaintiff, in which the recovery is limited to the pain and suffering endured for nine months, a verdict for $10,000 is excessive, and should be reduced to $7,000.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 24, 1912, upon the verdict of a jury rendered in favor of the plaintiffs for $10,000, for personal injuries sustained by a passenger in a street railway collision. Affirmed on condition of remitting $3,000.

Kerr & McCord, for appellant.

Peters & Powell, for respondents.

FULLERTON, J.—The appellant owns and operates a street and interurban railway system in the city of Seattle and territory adjacent thereto, and is a common carrier of passengers for hire. On April 30, 1910, one Elizabeth Bell, while a passenger on the appellant's railway, was injured in a collision occurring thereon, and thereafter commenced this action to recover for the injuries suffered. After commencing the action, and some nine months after receiving the injury, Mrs. Bell died, leaving surviving her as her sole heirs at law an adult daughter and two minor sons. Thereafter these heirs, the minors appearing by a guardian *ad litem*, applied to the court through their counsel for leave to prosecute the action to final judgment. The court granted the application over the objection of the appellant, and thereupon the applicants filed an amended and supplemental complaint, repeating the allegations of the original complaint filed by their mother, and alleging in addition thereto the fact of her

death, their relationship to her, and that her death was occasioned by the injuries she received in the collision. A demurrer was interposed to the complaint, which the trial court overruled. An answer was thereupon filed which put in issue the material allegations of the complaint, and on the issues thus joined a trial was had to a jury, which resulted in a verdict and judgment for the respondents in the sum of $10,000. This appeal is taken from the judgment entered.

The first assignments of error relied upon by the appellant challenge the right of the respondents to prosecute the action to judgment. It is contended that, since an action in tort for personal injuries at common law did not survive the death of the complainant, it is essential that some statutory authority authorizing such prosecution be found before it can be said that the right exists, and that in this state there is no such statute. The trial court found this authorization in that section of the code (Rem. & Bal.) relating to the survival of actions, which reads as follows:

"Sec. 194. No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death."

It is insisted by the appellant, however, that this section has no reference to an action a female person may have begun for a personal injury, or a right of action she may have for such an injury, but refers solely to such rights as they pertain to a male person. It is argued that this is evidenced not only by the literal wording of the statute, since the masculine

pronoun alone is used, but by its evident meaning, as its purpose was to provide for those dependent upon the injured person for support, and this duty usually devolves upon a male person. But we cannot accept this as a correct interpretation of the statute. That the use of the masculine pronoun was not intended to confine the right of survivorship to actions accruing to male persons alone is made clear by reference to the contemporaneous statutes relating to the civil and criminal procedure, of which this section forms a part. By § 144, as it is numbered in Remington & Ballinger's Code, it is provided that the provisions of the code shall be liberally construed, and shall not be limited by any rule of strict construction, and by § 148, it is provided that "words importing the masculine gender may be extended to females also." And other sections, for example, §§ 193, 198, 199, 200, 201, 203, 208, 211, 224, 238, 241, 247, and many more which only a casual reading will disclose, use the masculine pronoun to designate the persons affected by their provisions, when it is manifest by the context that persons of both sexes are included. These considerations make it clear that the mere use of the masculine pronoun in the section in question does not evidence an intent on the part of the legislature to confine its provisions to male persons alone.

The second reason suggested seems to us also to be without force. If the purpose of the statute is the protection of the children and the dependent collateral relatives of the injured person, this purpose is not accomplished by confining its provisions to children and dependent relatives of male persons alone. In this state, as elsewhere, as it is well known, there are many dependent minor children whose sole support is a widowed mother, and who would be left to be cared for by charity or the bounty of the state if deprived of such support. It cannot be that the legislature intended to leave children in this situation unprotected when legislating in behalf of dependent children generally. On the contrary, we would expect such to be the first to receive consideration rather than

to be wholly neglected. We conclude, therefore, that the court did not err in allowing the action to be prosecuted to judgment by the respondents.

The appellant next contends that the evidence was insufficient to make a case for the jury on the issue that Mrs. Bell's death was caused by the injuries which she sustained in the accident. It was given in evidence, and apparently conceded, that the immediate cause of her death was pleurisy with effusion, and the appellant apparently argues that this was the proximate cause of her death. But clearly the proximate cause of her death was the cause that produced the pleurisy with effusion; that is to say, whether the pleurisy with effusion was or was not the result of the accident. On this question, the most that can be said is that the evidence was conflicting. Being so, it was of course a question of fact for the jury and not one of law for the court. But it will serve no useful purpose to review the evidence. Our perusal of it has convinced us that there was evidence sufficient to sustain the verdict, and this is as far as we have a right to inquire.

Elizabeth Bell died in the state of Kentucky. Immediately following her death, the attending physician prepared and filed with the bureau of vital statistics of Kentucky a certificate stating the fact and cause of her death. This certificate was read in evidence by the respondents as a part of their case in chief in the present action. At the close of the evidence, the appellant requested the court to instruct the jury to the effect "that the death certificate offered by the plaintiffs in this case is in itself *prima facie* evidence of the cause of her death." The court declined to give the instruction as requested, but gave in lieu thereof the following:

"In the absence of other testimony, gentlemen, the certificate of the physician who signed the death certificate would be *prima facie* evidence of the cause of death, but in passing upon the cause of death you will take into consideration not only the death certificate, but all of the other evidence before you relating to the cause of death."

The refusal of the court to charge as requested is assigned as error, but we think the instruction given by the court as favorable to the appellant as the law of the case warranted. Our statute, it is true, provides for the filing of death certificates with county auditors, and makes such certificates *prima facie* evidence of facts therein recited; and it is a rule of law in this state that, in the absence of a contrary showing, the courts will presume the statutes of a sister state to be the same as our own. But it does not follow from this that the court will presume that the statutes of the state of Kentucky make a death certificate filed in that state *prima facie* evidence of the facts therein recited in the courts of the state of Washington. The utmost limit of the presumption would be that such certificates were *prima facie* evidence of the facts therein recited in the courts of the state of Kentucky. To hold otherwise would be to hold that the state of Kentucky could declare rules of evidence for the courts of the state of Washington. This is not the meaning of the rule. The presumption simply takes the place of proofs. If it had been proven that the statutes of Kentucky were similar to or identical with our own statutes, and if an issue was presented to the courts of Washington whether a death certificate was *prima facie* evidence in the state of Kentucky of the facts recited therein, no doubt our courts would hold that it was such *prima facie* evidence in those courts because the statutes of the state so provided; but it would not hold that because such a certificate was *prima facie* evidence in the state of Kentucky it was so in this state. On the contrary, whether such certificates are *prima facie* evidence in this state depends upon our own statute, and our statute does not so provide.

The court also gave the following instruction:

"Now if you should find from the evidence, gentlemen, that the death of the mother of these plaintiffs would not have occurred but for the injuries she sustained in the accident which occurred, if you should find in other words that the injury sustained by her in this accident, if you should find she did

sustain injuries, were the proximate cause of the death of the mother of the plaintiffs, then the plaintiffs would be entitled to recover such a sum as the mother could have recovered under the evidence before you if she were alive at present and prosecuting this action at this time."

It is insisted that the foregoing instruction conveyed to the jury an erroneous and misleading impression as to the length of time for which the respondents would be entitled to recover for the pain and suffering endured by Mrs. Bell; that the limitation of time for which recovery can be had is the time between the injury and the time of the injured person's death, whereas this instruction implies that the time lay between the injury and the time of the trial. The instruction is faulty in the respect complained of, but the meaning of the court was made clear in the subsequent proceedings. At the conclusion of the instructions the following occurred:

"Mr. Thompson: If Your Honor please, there is one instruction that the court gave that I want to ask that the court modify unless the court really does mean what the instruction says, our view being that if, upon the state of facts presented, plaintiffs were entitled to recover at all they would not be entitled to recover what the mother might recover if she were today waging her suit, but what she might have recovered had she gotten well at the time that she died instead of dying, had gotten well at that time and was suing to recover what damage she sustained up to that time. If she were now waging her suit she could recover any damages that she had sustained not only up to that time, but that her condition might show that she would suffer in the future, and the rule is very different. The Court: I intended to make it clear to the jury that the damage sustained by the mother of the plaintiffs, if any, up to the time of her death would be the only damage to be considered in arriving at the amount of the award. Mr. Thompson: But Your Honor stated the damage that she could recover if she were now alive and prosecuting this suit here today in her own behalf. The Court: I intended to say if she had tried the case on the day before her death. Of course the jury could not consider any suffer-

ing unless she suffered. Mr. Thompson: If Your Honor will make that clear to the jury. It may have been clear to the jury, but it was not to me. The Court: Perhaps the court was not clear in the statement. It is not to be presumed that the mother of the plaintiffs suffered anything after her death and the only suffering that the jury can consider in fixing the amount of the award, if they should find for the plaintiff, would be the suffering she endured from the time of the accident, on account of the accident, up to the time of her death. Mr. Thompson: Not including the death itself. The Court: Oh, no. No damages resulting from the death can be considered by the jury. I thought I so stated in clear terms."

The cause was thereupon argued to the jury by counsel, at the conclusion of which the following occurred:

"A Juror: Your Honor, may I ask one question? The Court: Yes. The Juror: If we should find for the plaintiff is it simply for nine months' suffering. Do we find anything, as I understand it, nothing for death, nothing for the minor heirs; it is simply for the suffering this woman sustained during the nine months she lived after the accident? The Court: Yes, what would have compensated her for the conditions brought about by this accident, the suffering, mental and physical that she may have endured. The Juror: And simply for the time between the accident and the death? The Court: Yes."

It seems to us clear that such error as there was in the instruction as first given was cured by these subsequent proceedings.

The final objection is that the verdict is excessive. This objection we think has support in the record. As we have said, the jury were limited in their award to compensation for the pain and suffering the injured person was compelled to undergo because of the accident, between the time of the accident and the time of her death. The jury could award nothing for her death, nothing for the losses caused the respondents by reason of her death, and nothing by way of punishment of the appellant because of its negligence. *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795:

Helland v. Bridenstine, 55 Wash. 470, 104 Pac. 626. The causes for which the award could be made being thus limited, we think $10,000 excessive. It is not, however, necessary that a new trial be awarded, as we think the respondents should have the privilege of accepting a judgment for such sum as the court feels that it could affirm without submitting the question of the amount of the award to a second jury. The order therefore will be that, if the respondents, within thirty days after the remittitur from this court reaches the trial court, consent in writing to take a judgment for $7,000, the trial court is directed to enter a judgment in their favor for that sum; otherwise to award a new trial.

MOUNT, C. J., MAIN, ELLIS, and MORRIS, JJ., concur.

[No. 10558. Department One. December 28, 1912.]

H. G. CROWLEY, *Appellant*, v. L. R. BYRNE *et al.*, *Respondents*.[1]

QUIETING TITLE—DEFENSES—RELIEF—STATUTORY ACTION. Under Rem. & Bal. Code, § 785, providing that a person having an interest in real estate and the right to possession may recover the same and may have judgment quieting title, a defendant cannot defend upon the ground that a quitclaim deed constituting an alleged cloud is invalid and in fact not a cloud because not recorded, where he claims title under such deed.

VENDOR AND PURCHASER—OPTIONS—PERFORMANCE—WHEN TITLE PASSES—RELATION. Where an option to purchase land has been exercised by payment of the price, the title relates back to the date of the option, as against parties having notice thereof.

PARTITION—ACTIONS—JOINDER—QUIETING TITLE—RELIEF. Rights of action to quiet title and for a partition may be united in one action, under Rem. & Bal. Code, § 844, providing that in partition, the rights of the several parties may be determined.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered February 5, 1912, dismissing an

[1]Reported in 129 Pac. 113.

action to quiet title and for partition, upon sustaining a demurrer to the complaint. Reversed.

Edwin H. Flick and *Allan H. Trumbull* (*C. E. Hughes*, of counsel), for appellant.

L. R. Byrne (*A. J. Falknor*, of counsel), for respondents.

PARKER, J.—This is, in substance, an action to quiet title in plaintiff to an undivided one-half interest in a tract of unoccupied land in Jefferson county, and to obtain partition of the land between the plaintiff and the defendants; though counsel for the defendants seem to proceed upon the theory that it is strictly an action to remove a cloud from plaintiff's title to the land and to obtain partition thereof. The trial court sustained the defendants' demurrer to the plaintiff's third amended complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. Judgment of dismissal was thereupon rendered against him, from which he has appealed.

The controlling facts shown by the allegations of the complaint may be summarized as follows: On March 13, 1909, Sarah J. Waits was the owner of the land here involved. On that date she entered into an option contract, in writing, with appellant for the sale of an undivided one-half interest in the land to him, in consideration of the sum of one dollar, whereby she agreed to sell and convey to him an undivided one-half interest in the land at any time within two years thereafter, for the sum of $1,250. Thereafter, on January 3, 1910, the contract was filed for record in the office of the auditor of Jefferson county. Thereafter, on January 5, 1910, appellant paid to Sarah J. Waits the full amount of the purchase price for the land, as agreed upon in the contract, but did not then receive a deed of conveyance from her. Thereafter, on the same day, Sarah J. Waits executed and delivered to respondent L. R. Byrne, a quitclaim deed purporting to convey to him the entire tract of land. Respondents claim the whole of

the land, evidently under this deed. Before Byrne received this quitclaim deed, and before he paid any part of the consideration thereof, he had actual knowledge of the existence of appellant's option contract to purchase an undivided one-half interest in the land, and also constructive knowledge thereof by reason of its prior recording, and also had then actual knowledge of the fact that appellant had paid to Sarah J. Waits the full amount of the purchase price of the land under his option contract. Thereafter, on March 1, 1911, before the expiration of the two years specified in the contract for the exercising of appellant's option, Sarah J. Waits executed and delivered to him, in pursuance of the option contract, a warranty deed for an undivided half interest in the land. The land is unoccupied. Other facts appearing by the allegations of the complaint, touching an alleged oral agreement made by respondent L. R. Byrne with Sarah J. Waits at the time of receiving the quitclaim deed from her, by which he was to hold an undivided interest in the land in trust for appellant and convey it to him, we need not notice. Some conditions other than those we have noticed were contained in the contract, but they are not material here. We will, for argument's sake, regard the contract as a pure option. This view of the contract is the most favorable to respondents' contentions.

Our conclusions render it more appropriate to notice the contentions made by counsel for respondents against the sufficiency of this complaint to state a cause of action than to notice the contentions of appellant to the contrary. Counsel for respondents, proceeding evidently upon the theory that this is strictly an action to remove a cloud only, consisting solely of the quitclaim deed given by Sarah J. Waits to respondent L. R. Byrne, contend that, since there is no allegation of the recording of that deed, it is not such a cloud upon appellant's title as a court of equity will concern itself with removing.

The decisions of the courts have heretofore given countenance to the view that there is a substantial distinction between an action to quiet title as against an asserted claim of title by another, and an action to remove a cloud consisting of some specific instrument; and that, in the latter case, a defendant may successfully defend upon the ground that the instrument constituting the alleged cloud is in fact not a cloud. This doctrine seems to be recognized in *Lemon v. Waterman*, 2 Wash. Ter. 485, 7 Pac. 899, and *Watson v. Glover*, 21 Wash. 677, 59 Pac. 516, though it seems to have been unnecessary to the decision of either of those cases. There is, however, room for arguing that this doctrine is materially weakened, if indeed not rendered obsolete in this state, by our decisions and statutes relating to actions for the trial of title to land. However this may be, it is manifest here that this is not solely an action to remove a cloud created by the quitclaim deed of Sarah J. Waits to respondent upon appellant's title, but it is an action to quiet the title of appellant as against the *claim of title* made by respondents under that deed, as well as for partition. It seems clear to us that respondents cannot be heard to say that this quitclaim deed is not a cloud upon appellant's title and at the same time claim title thereunder, as the allegations of this complaint show. It has been held, both by the territorial court and by this court, that a decree quieting title may be had notwithstanding the absolute invalidity of the claim or estate moved against. *Lemon v. Waterman*, and *Watson v. Glover, supra; McGuinness v. Hargiss*, 56 Wash. 162, 105 Pac. 233.

It is true that the holdings in those cases had particular reference to actions prosecuted under Rem. & Bal. Code, § 809, and it is insisted by counsel for respondents that the allegations of this complaint are not sufficient to constitute a cause of action under that section. However, the facts pleaded are sufficient to constitute a cause of action under Rem. & Bal. Code, § 785, which provides:

"Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title."

And we think the doctrine announced in the cases cited is of equal force and applicability to actions under this section. *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640, is in harmony with this view. Indeed, whatever the rule may have formerly been in an action to remove a cloud, strictly speaking, we think under our present law that the defendant in an action to try title to land, whatever its nature, seldom, if ever, will be permitted to urge in defense of such action that the cloud which the plaintiff is seeking to remove or the claim which he is seeking to quiet his title against, is not a cloud or is not a valid claim. If this be a defendant's attitude, he can have no possible interest in the action except to avoid the taxation of costs therein against him, and this can readily be avoided by a disclaimer on his part. What right a defendant has under such circumstances to say that the plaintiff may not have a decree removing a cloud which he conceives to be such, or a decree quieting his title as against a claim which he conceives may even in the slightest degree impair the full enjoyment of his title, is indeed difficult to conceive.

Some contention seems to be made by counsel for respondents upon the theory that, at the time of the execution of the quitclaim deed by Sarah J. Waits to respondent L. R. Byrne, appellant did not have title to the land, but only an option to purchase; and that an option to purchase does not create any interest in the land. It is true appellant did not then have a deed, but he had an unexpired option to purchase, upon which he had paid the entire purchase price, which thereby in law became a fully executed contract of purchase

upon his part, vesting in him the equitable title to the land as against Sarah J. Waits and respondents, her grantees, who had full notice of appellant's rights. But even if appellant had not at that time paid the purchase price and thereby elected to exercise his option, such option did not expire until March 13, 1911, more than one year thereafter, and within which time he received from Sarah J. Waits a warranty deed, in compliance with the option contract, which of course was an election to exercise the option upon his part within its life, and an acknowledgment on her part that she had received the full purchase price within its life.

In *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522, it is said:

"It has been said that an option to purchase land does not before acceptance vest in the holder of the option an interest in the land. *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213; *Gustin v. Union School District*, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; *Phoenix Ins. Co. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251. On the other hand, there are cases holding that the grant, on a valuable consideration, of an option to purchase, constitutes the grantee the equitable owner of an interest in the property. *House v. Jackson*, 24 Or. 89, 32 Pac. 1027; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Telford v. Frost*, 76 Wis. 172, 44 N. W. 825; *Wall v. Minneapolis etc. Ry. Co.*, 86 Wis. 48, 56 N. W. 367. At any rate the option vests in the grantee the right or privilege of acquiring an interest in the land, and, when accepted, entitles him to call for specific performance. *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *People Street Ry. Co. v. Spencer*, 156 Pa. St. 85, 36 Am. St. Rep. 22, 27 Atl. 113; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580. Such right, when exercised, must necessarily relate back to the time of giving the option (*People St. Ry. Co. v. Spencer*, 156 Pa. St. 85, 36 Am. St. Rep. 22, 27 Atl. 113), so as to cut off intervening rights acquired with knowledge of the existence of the option. A subsequent purchaser with notice of a valid and irrevocable option would certainly take sub-

ject to the right of the option holder to complete his purchase."

We are of the opinion that as between the parties the option contract gave appellant an interest in the land such as respondents were bound by, having notice thereof, even though, at the time they acquired the quitclaim deed from Sarah J. Waits, appellant had not exercised his option or paid any part of the purchase price; and that upon receiving the deed from Sarah J. Waits within the life of the option, thus evidencing the exercise of the option on the part of appellant and the receipt of the purchase price on the part of Sarah J. Waits, the title acquired by appellant related back to the date of his acquiring the option.

Some contention is made by counsel for respondent that an action for partition cannot be maintained where the title of the plaintiff is questioned; in other words, that appellant cannot quiet his title and have partition in the same action. This question has been decided adversely to counsel's contention in *Hill v. Young*, 7 Wash. 33, 34 Pac. 144, and *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671. Indeed our statute relating to partition seems to expressly so provide in Rem. & Bal. Code, § 844, as follows:

"The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined in such suit."

Our attention is called to the case of *Chapman v. Allen*, 11 Wash. 627, 40 Pac. 219, as opposed to this view, but a careful reading of that decision will show that the plaintiff failed because he did not state facts showing that he had any interest in the land.

The specific prayer of appellant's complaint might seem to be somewhat more appropriate to an action for specific performance, since it asks that respondents be required to execute him a quitclaim deed for an undivided half interest in the land. This is followed, however, by a general prayer

for "such further and different relief as the court may deem meet in the premises." We are of the opinion that, if the allegations of appellant's complaint, which we have briefly summarized, are true, he is entitled to a decree quieting his title to an undivided half interest in the land as against the claims of respondents, and also to partition of the land.

The judgment of the trial court is reversed, with directions to proceed in accordance with the views here expressed.

MOUNT, C. J., CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10570. Department Two. December 30, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. DREWRY M. PEEPLES, *Appellant*.[1]

FORGERY — UTTERING — GUILTY KNOWLEDGE — EVIDENCE — SUFFICIENCY. In a prosecution for forgery, there was sufficient evidence that defendant had a guilty knowledge of the spurious character of the papers, a note and mortgage, and participated in their utterance, where it appears that he took the papers to be executed by a spurious grantor, made affidavit that he knew the family to aid in closing the loan, aided in cashing the checks, retaining commissions, and denied acquaintance with one of the guilty parties whom he had known for a long time.

WITNESSES—CROSS-EXAMINATION—CRIMINAL LAW—EVIDENCE OF OTHER ACTS—ADMISSIBILITY. In a prosecution for forgery, where accused had sworn in his own behalf and detailed a state of facts favorable to himself, stating that he relied on the statements of one H. and that his desk had been rifled and papers taken away, it is proper on cross-examination, as testing his credit and impeaching his testimony, to ask if he and H. had not been engaged in passing off other spurious papers on the public, and if his confederates had not rifled his desk in order to do away with the papers.

CRIMINAL LAW—TRIAL—CROSS-EXAMINATION OF DEFENDANT—SCOPE. Where accused offers himself as a witness, he submits himself to cross-examination to impair his credit, the same as any other witness.

[1]Reported in 129 Pac. 108.

Criminal Law—Trial—Argument to Jury—Misconduct of Counsel. It is not misconduct for a prosecuting attorney to address argumentative remarks to the jury if they are free from expressions of individual opinion as to the defendant's guilt independent of the testimony in the case.

Appeal—Preservation of Grounds—Exceptions to Instructions—Manner and Time of Taking. Exceptions to instructions and to the refusal to give instructions may not be merely filed, but must be called to the attention of the judge and noted in the minutes as required by Rem. & Bal. Code, § 384, although they may be taken at any time before the hearing of a motion for a new trial.

Evidence—Documentary Evidence—Lost Papers—Copies—Identification—Sufficiency. The loss of an original affidavit is sufficiently shown to admit evidence of a copy, which several witnesses testified was a true copy, where it appears that the original was filed as an exhibit at a former trial and officials in whose custody it should be testified that search had been made for it and it could not be found.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 9, 1912, upon a trial and conviction of forgery. Affirmed.

Chas. W. Fouts, for appellant.

John F. Murphy, *Hugh M. Caldwell*, and *H. B. Butler*, for respondent.

Ellis, J.—The defendant was charged by information with the commission of the crime of forgery in the first degree, by knowingly uttering a forged mortgage. He was tried and convicted, and appealed to this court. On that appeal the judgment of conviction was reversed because of an erroneous instruction, to the effect that the fact of forgery is a circumstance from which guilty knowledge is presumed unless rebutted. *State v. Peeples*, 65 Wash. 673, 118 Pac. 906. In due course he was again tried and found guilty as charged. His motion for a new trial was overruled, judgment was pronounced, and sentence imposed. He has again appealed.

The first two assignments of error are general in their

nature, being based upon the court's action in denying a new trial and imposing sentence. It is inferentially argued that the evidence was insufficient to support the verdict. The constituents of the crime charged and the things necessary to its proof are, (1) the spurious character of the instrument, (2) its utterance by the appellant, and (3) his guilty knowledge of its spurious nature. As sustaining the first two of these elements, the evidence was overwhelming. It was shown beyond question that the mortgage was a forgery and the appellant admitted his participation in its utterance. The evidence conclusively showed, that the real owner of the property mortgaged was Martha B. Barnes; that her husband was W. H. T. Barnes; that they resided at Blaine, Whatcom county, Washington, were not in Portland when the spurious mortgage was there executed, and knew nothing of the mortgage till after it was made and the money paid out upon it.

The sole debatable fact upon the evidence was as to the appellant's guilty knowledge of the forgery. Such knowledge may be proven, like any other fact, by circumstantial evidence. The mortgage, the forgery of which is charged, purported to have been executed by Martha B. Barnes and W. H. T. Barnes, husband and wife, before a notary at Portland, Oregon. The appellant testified that in May, 1910, one D. A. Hatfield, whom he had known for a long time, well and favorably, brought to the office of the Washington Abstract Company, where appellant was then employed, a man and two women, none of whom the appellant had ever seen before; that Hatfield introduced the man as Mr. Barnes, one of the women as Mrs. Barnes, his wife, and the other, a young woman as Miss Barnes, the man's daughter; that they inquired the price of an abstract of title to the property which was afterwards covered by the alleged spurious mortgage; that about a week later he met the man Barnes on the street, and Barnes then introduced to him a Mr. Arlington, whom appellant had never seen before, as Barnes' brother-

in-law; that appellant next met the man Barnes about July 20, 1910, in appellant's office in the Melhorn building in Seattle, where appellant was then engaged in the real estate and loan business; that he brought with him the abstract of title to the property in question, and wanted appellant to secure a loan of $5,000 upon the property to clear up delinquent taxes and special assessments against it; that appellant undertook the commission, and during the month of August, opened negotiations to that end with one Hugh A. Goodfellow. The evidence further showed that a loan was finally arranged for, and a note and mortgage prepared in Goodfellow's office, which the appellant took away with him to have executed by Martha B. Barnes, in whose name the property stood of record, and W. H. T. Barnes, her husband; that a few days afterwards the appellant returned with the papers executed, stating that he had sent them to Portland for that purpose; that one J. R. Seaborn, a client of Goodfellow's who furnished the money for the loan, was notified, and the three went to the office of Seaborn's attorney, who had examined the abstract and who then examined the papers. The attorney testified that, in examining the title, he noted that one Mary E. Barnes had held the title in 1893, and he required some proof that she was then unmarried; that the appellant produced an affidavit to the effect that appellant knew Mary E. Barnes and that she was an unmarried woman when she acquired the property in 1893. The affidavit was sworn to by the appellant before Hugh A. Goodfellow as notary public. The attorney, Goodfellow and Seaborn all testified that the appellant then stated that he had known the Barnes family for a long time and that he knew that Miss Barnes had never been married. The failure to produce the original being accounted for, a copy of this affidavit was admitted in evidence over the appellant's objections. The copy was as follows:

"D. M. Peeples being first duly sworn on oath deposes and says: that he knew and was acquainted with Mary E. Barnes

the grantee in that certain deed dated the 5th day of August, 1893, in which James Barnes Jr. was grantor conveying all of block thirty-five in Woodland Addition to Salmon Bay City; that said Mary E. Barnes was unmarried at the time she acquired the above named property and during all the time she held said property remained unmarried.

"In witness whereof I have hereunto set my hand this 3rd day of September 1910. (Signed) D. M. Peeples. Subscribed and sworn before me this 3rd day of September, 1910.

(Signed) Hugh A. Goodfellow. Notary Public in and for the State of Washington, residing at Seattle."

The loan was closed, the papers delivered, and something near $3,400 of the proceeds applied in payment of taxes and special assessments against the property. Of the balance, $936.13 was turned over to the appellant by Goodfellow's check payable to the order of Martha B. Barnes, and about $500 was held back pending the clearing up of an apparent judgment lien upon the property. This occurred about September 3, 1910. Finally, the parties being satisfied that the judgment was not a lien upon the property, Goodfellow gave the appellant his check payable to the order of Martha B. Barnes for $432.01, dated September 12, 1910, that being the balance of the loan after deducting $250 as Goodfellows' commission. The appellant testified that he sent each of these checks to Barnes at Portland as soon as received; that about September 6, the man Arlington appeared at his office with the first check, and a letter from Barnes asking the appellant to aid Arlington in cashing the check, which he did, retaining from the proceeds his own commission of $100, and about $35, the cost of the abstract, turning the balance over to Arlington; that about September 13 or 14 a young man, whom appellant had never seen before or since, appeared at appellant's office with the other check and a letter from Barnes introducing him as Mr. Clark, a nephew of Barnes, and asking the appellant to aid the young man in

cashing the check, which he did, turning the money over to the man Clark.

On cross-examination the appellant admitted that he went to Portland on September 7, on other business, and while there saw and talked with Hatfield. It also appeared that, about the time of these transactions, one W. M. Whitney, an attorney, was investigating another transaction in which Hatfield and Arlington were implicated and with which the appellant had some connection. The appellant testified that Whitney called upon him and he had furnished Whitney the name and address of Hatfield. Whitney testified that on September 7 or 8, he called on the appellant to secure information as to the two men, and that the appellant said that he did not know Arlington at all and at first said that he did not know who Hatfield was, but finally said maybe he did know him and that he would try to find out where he was and would notify Whitney, but that he never did in fact furnish Hatfield's address. The appellant also testified that, pending the closing of the loan, he received several letters from Barnes from Portland, one of which he introduced in evidence. C. S. Harley, a banker, who qualified as a handwriting expert, compared this letter with another paper in Hatfield's handwriting, and testified that in his opinion both papers had been written by the same person. We think there are ample circumstances disclosed by this evidence from which the jury might reasonably find that the appellant had guilty knowledge of the forgery. He testified that he had known Hatfield for a long time, but if Whitney is believed he denied any acquaintance with him, though within a day or two of that time he had seen and talked with him in Portland. He testified that he had never seen any of the spurious Barnes family prior to May, 1910, but made an affidavit, in order to secure the loan, that he knew that Mary E. Barnes was an unmarried woman in 1893. He produced a letter purporting to come from Barnes in Portland at a time when the evidence shows Hatfield was in Portland, and this letter was pro-

nounced by the expert as in Hatfield's handwriting. He admitted that throughout this period he was in correspondence with Hatfield also, though at that time denying his acquaintance. Without further particularizing, we are satisfied that no one can read the entire record without reaching the conclusion that the appellant was aware of the spurious character of the papers from their inception, and knowingly participated in their utterance. There was evidence tending to establish every element of the crime charged. The trial court having denied the motion for a new trial, we cannot interfere unless there was prejudicial error in the admission of evidence or in the giving or refusal to give instructions. *State v. Bailey*, 67 Wash. 336, 121 Pac. 821, and cases there cited.

On cross-examination of the appellant, the following questions were permitted:

"Q. Isn't is a fact, Mr. Peeples, that you and Mr. Hatfield and others were engaged in passing off these spurious papers on the public, and that you were engaged in this transaction in the same way? . . . Q. Isn't it a fact you executed a fictitious deed from John Paulson to Dave Arlington on July 12, 1909?"

The appellant contends that this constituted error in that it tended to prejudice the jury by connecting him with the commission of other offenses. The appellant had testified to the effect that he felt warranted in relying upon Hatfield in the matter of the introduction of the Barnes family. The first question was competent on cross-examination for the purpose of testing his right to so rely. He had also testified that he had never met Arlington until the spurious Barnes introduced him on the street. The second question was competent cross-examination upon this point. The appellant also testified that, after his arrest, his desk had been rifled and papers in connection with the transaction taken away. On cross-examination he was asked if confederates of his had not taken the letters to prevent the officers from getting them. All of these questions had a direct relation to the

things to which the appellant had testified in chief. When a defendant as a witness in his own behalf details a state of facts favorable to himself, he necessarily subjects himself to cross-examination relative to those facts. His credit as a witness may be tested and his testimony impeached in the same manner and to the same extent as that of any other witness. Rem. & Bal. Code, § 2148; *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. 888; *State v. Armstrong*, 29 Wash. 57, 69 Pac. 392; *State v. Hill*, 45 Wash. 694, 89 Pac. 160.

"Under our constitution a defendant in a criminal case can not be compelled to give evidence against himself, but when he voluntarily offers himself as a witness in his own behalf, and so testifies, he is 'subject to all the rules of law relating to cross-examinations of other witnesses.' Bal. Code, § 6941; Pierce's Code, § 2165. And, in case the accused testifies in his own behalf, he is subject to cross-examination to impair his credit *as a witness* to the same extent as any other witness is (Abbott, Trial Brief [Criminal Causes], § 396, and cases cited); and, generally may be impeached in the same manner as any other witnesses (*State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888), 'by reputation as evidence of character, by cross-examination to character, by conviction of crime, and the like;' 'for otherwise, if he were a false witness, the customary methods of exposing this would not be available, and the investigation of truth and the punishment of crime would be defeated.'" *State v. Melvern*, 32 Wash. 7, 26, 72 Pac. 489, 495.

In *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179, the cross-examination which was held improper related to a matter wholly disconnected from the defendant's testimony in chief. The distinction from the case before us is obvious.

In arguing the case to the jury, counsel for the state said: "Why should this man Hatfield be writing to this man if they were not carrying on the same nefarious practices?" And again: "Don't you suppose a gang working like these people are going to have a few confederates working with them?" Exceptions were taken and these remarks are assigned as misconduct necessitating a reversal. The connec-

tion in which these remarks were made is not preserved in the record, but even dissociated from context, they evince an argumentative character and are not such expressions of individual opinion of the appellant's guilt, independent of the testimony of the case, as to constitute misconduct. *State v. Armstrong*, 37 Wash. 51, 79 Pac. 490; *State v. Marion*, 68 Wash. 675, 124 Pac. 125; *People v. Hess*, 85 Mich. 128, 48 N. W. 181; *People v. Welch*, 80 Mich. 616, 45 N. W. 482. While intemperate assertions of opinion not based upon any evidence will never be tolerated, it is none the less in the interest of a sound public policy that prosecuting officers be permitted a reasonable latitude in argumentative deduction from the evidence. That is all that these remarks upon their face purport. They do not constitute prejudicial error.

Error is also assigned upon the failure of the court to give certain instructions which it is claimed were requested by the appellant. The trial was completed on February 28, 1912. A motion for a new trial was filed on March 1, 1912, which was denied on March 9, 1912. On February 27, 1912, the proposed instructions, the failure to give which is complained of, were filed. On March 1, 1912, exceptions to the failure to give them were filed. There is nothing in the record to indicate that either these proposed instructions or these exceptions were ever called to the attention of the trial court. This is also true of the exceptions to the instructions given by the court. They are not referred to nor included in the statement of facts certified to by the trial judge, but merely appear in the transcript among the other files. This constituted neither a sufficient request, nor sufficient exceptions to its refusal, nor sufficient exceptions to the instructions given. The amendatory act of 1909 (Rem. & Bal. Code, § 339), relates merely to the time, not the manner, of taking exceptions. The manner of taking exceptions is still determinable by the old law (Rem. & Bal. Code, §384). Though exceptions may now be taken at any time before the

hearing of the motion for a new trial so that the trial judge may have an opportunity to correct, in his ruling upon that motion, any error he may have made in his instructions, thus saving the necessity for review by appeal, they must still be stated to the trial judge and by him noted in the minutes of the court or embodied in the record by the stenographer taking the record. Otherwise they would not serve their intended purpose. They would be an idle formality. This same question was logically discussed and the above view conclusively adopted by this court in *Coffey v. Seattle Elec. Co.*, 59 Wash. 686, 109 Pac. 202. The exceptions are not sufficient to permit a review of the court's action either in refusing to give or in the giving of instructions, save one to the giving of which exception was taken at the time and noted in the record by the stenographer.

The jury requested an instruction upon the purported copy of the affidavit above quoted. The appellant objected to any instruction, except that the jury be instructed to disregard the exhibit on the ground that no proper foundation had been laid for its introduction. It is not claimed that the instruction as given was not proper if the exhibit was properly admitted. We think it was. It was shown that the original affidavit was admitted in evidence at the former trial, and that search had been made in the papers in that case in the supreme court and that it could not be found. It appeared that the affidavit was referred to in the certificate of the trial judge in that case as "Exhibit E." The transcript clerk in the county clerk's office of King county testified that, in such a case, he always sent up all exhibits referred to in the judge's certificate if he could find them, and that if any could not be found he notified the attorneys in the particular case. The vault clerk in the office of the county clerk for King county testified that he had searched in the files of the original case for the original affidavit, and that he could not find it. He also testified that none of the exhibits in that case were returned to him after

being sent up to the supreme court. The notary before whom the original affidavit was sworn to testified that the purported copy offered stated exactly what the original did, and, though he admitted that he did not actually compare the two, that he read the offered paper over with the original a number of times. The deputy prosecuting attorney who conducted the former trial for the state testified that the paper offered was in substance the same as the original; that he had examined the original several times, introduced it in evidence on the former trial, and read it to the jury; that the original contained the very allegations found in the paper offered and in his judgment the paper was a copy of the original affidavit. The attorney who examined the abstract for the purpose of the loan and on whose demand the original affidavit was made testified that in his opinion the paper offered was a copy of that affidavit. We think this evidence sufficiently excused the failure to produce the original affidavit and was sufficient to admit the paper produced as proof of the contents of the original. It follows that there was no error either in admitting the paper in evidence or in giving the instruction, which was to the effect that, if the jury found that the defendant made an affidavit and that the paper in evidence was a true copy of that affidavit, then it was as much evidence of what was said or sworn to as the original itself would have been.

Notwithstanding the failure to properly take exceptions, we have carefully examined the instructions given in the light of the evidence, and we are satisfied that they fairly presented the law as applied thereto. We find in the record no prejudicial error.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, MORRIS, and MAIN, JJ., concur.

[No. 10463. Department Two. January 8, 1913.]

CLARA MAY STEDMAN, *Respondent*, v. J. B. KEENER *et al.*, *Appellants*.[1]

APPEAL—RECORD—STATEMENT OF FACTS. In the absence of the evidence, brought up either by a bill of exceptions or statement of facts, it will be presumed that the verdict was properly returned.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 22, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

M. Mulligan and *W. McB. Perrin*, for appellants.

PER CURIAM.—This action was brought by the plaintiff against defendants for the purpose of recovering money alleged to have been wrongfully invested by the defendant J. B. Keener. Demurrer to the complaint was made and overruled. Thereupon the defendants answered separately. The cause came on for trial before the court and a jury. The verdict was for the plaintiff. Motion for a new trial being made and overruled, judgment was entered upon the verdict, from which judgment this appeal was taken.

No transcript of the evidence introduced upon the trial has been brought to this court by either bill of exceptions or statement of facts, in the absence of which we will presume that the verdict was properly returned and the judgment rightfully entered.

The judgment will therefore be affirmed.

[1]Reported in 128 Pac. 1047.

[No. 10487. Department One. January 3, 1913.]

MARGARET PALMER, *Appellant*, v. B. F. SHIELDS *et al.*, *Respondents*.[1]

FRAUD—FALSE REPRESENTATIONS—SALE OF STOCK—EVIDENCE—SUFFICIENCY. In an action to recover damages for fraudulent representations inducing the plaintiff to sell corporate stock at less than its value, a nonsuit is properly granted, where it appears that she did not rely upon the representations but employed an attorney to make an investigation and acted upon his advice after every opportunity to make an investigation, and that she made no complaint of the sale for three years.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 8, 1912, dismissing an action for fraud, upon granting a nonsuit. Affirmed.

John E. Humphries and *William A. Johnson*, for appellant.

Martin & Todd, for respondents.

CROW, J.—This action was commenced by Margaret Palmer against B. F. Shields, C. F. Shields, and William H. Livengood, to recover the difference between the alleged value of stock which she sold to or through defendants, and the price paid by them. Plaintiff's stock consisted of 3,200 shares, of the par value of one dollar each, in the Spokane Grain Company, a corporation organized under the laws of this state, with its principal place of business in the city of Seattle. The defendants were stockholders and officers of the corporation, in charge of its business and affairs. Plaintiff in substance alleged that, on August 14, 1907, the stock which she then sold to or through the defendants for $3,200 was of the actual value of $10,000; that she was inexperienced in and unused to business transactions, a fact well known to the defendants; that they confederated and conspired to take advantage of her and secure the stock for much less than its actual value; that they falsely represented to her that the

[1]Reported in 128 Pac. 1051.

corporation was in immediate danger of insolvency and liable to go into the hands of a receiver; that they stated she would not receive ten cents on the dollar unless she then sold her stock for $3,200; that they represented the assets of the corporation as insufficient to cause her to realize more than $3,200; that these representations were false and fraudulent; that the corporation was not then in danger of insolvency; that there was no probability of a receivership; that in fact it had assets of sufficient value over and above its liabilities to give plaintiff's stock a value of $10,000; that plaintiff, relying on the false and fraudulent representations thus made, was thereby induced to sell, and did sell, her stock for $3,200, and that she has been damaged in the sum of $7,000. The answer consisted of denials only. At the close of plaintiff's evidence, the trial judge entered a nonsuit and dismissed the action. The plaintiff has appealed.

The controlling question before us is whether the trial court erred in sustaining respondent's motions for a nonsuit. The appellant sold her stock on August 14, 1907, for $3,200. There is no evidence showing any dealing or negotiations between her and the respondents C. F. Shields and William H. Livengood or any representations by them. There can be no question but that as to them the nonsuit was properly granted. The only evidence introduced by appellant to show false and fraudulent representations as the basis of her claim was directed against the respondent B. F. Shields. After a careful examination of such evidence, we conclude it is insufficient to sustain any recovery against him. The theory of appellant's case is that she was fraudulently deceived by the representations of the respondent B. F. Shields as to the financial condition of the corporation; that, relying upon such representations, she made the sale, and that the stock was of the actual value of $10,000. In order that appellant may recover, it devolves upon her to show that the alleged representations were made; that they related to or assumed to state existing facts, that they were not expressions of opinion

only, that they were false, that she believed them to be true, that she relied and acted upon them, and that she was damaged thereby. We find that the appellant has failed to meet these requirements. Her evidence shows that she did not believe the statements and representations which she contends were made by the respondent B. F. Shields. She testified that, before acting upon his statements, she employed an attorney to investigate the affairs of the corporation and advise her; that the attorney had every opportunity to make such an investigation; that he was not denied access to the books or records of the corporation; that he advised appellant to sell her stock for $3,200; that she then made the sale; and that she did not make it until after she obtained his advice. It further appears from appellant's statements that, for nearly three years after the sale which was made on August 14, 1907, she made no complaint; that she did not commence this action until August 12, 1910, and that she made no demand upon respondents or the corporation prior to its commencement. The only evidence she produced to show the value of the stock consisted of certain trial balances and financial statements of the corporation, which were made prior to and shortly after the sale. A number of these statements had been delivered to her regularly as a stockholder, some of them a short time prior to the sale, and had remained in her possession or control until the date of the trial. All statements and trial balances made prior to the sale were subject to the examination and inspection of her attorney, and none of them differ materially from the trial balances made after the sale. If they were sufficient evidence at the trial to show that the stock had a value of $10,000 when sold, they were also sufficient evidence to show that fact before the sale was made and at the time when they were subject to the inspection of her attorney. The record indicates that, in the latter part of the year 1907, during a financial panic which prevailed throughout this country, appellant was anxious to sell her stock; and that she did sell it upon the advice of her

own attorney. If she was deceived or misled, which we do not believe, it was the fault of her attorney and not of the respondents or any of them.

The judgment is affirmed.

MOUNT, C. J., PARKER, GOSE, and CHADWICK, JJ., concur.

[No. 10625. Department One. January 3, 1913.]

ANNA KEOUGH, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS TO EVIDENCE—REVIEW. Error cannot be predicated upon misconduct of the party and counsel, in a personal injury case, in exciting the sympathy of the jury by showing that the plaintiff was a widow with children, where the evidence was admitted without objection of any kind until after verdict.

TRIAL—MISCONDUCT OF COUNSEL. It is not misconduct of counsel, warranting a new trial in a personal injury case, to ask plaintiff if two children present were her children.

APPEAL—OBJECTIONS TO MISCONDUCT OF COUNSEL. Misconduct of counsel in asking improper questions cannot be urged as error where no timely objection was made below.

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated on the admission of improper evidence going to the question of damages, where it is not claimed that the verdict was excessive.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 4, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in alighting from a street car. Affirmed.

James B. Howe and *H. S. Elliott*, for appellant.

Walter S. Fulton, for respondent.

MOUNT, C. J.—Plaintiff brought this action to recover damages for personal injuries. She alleged that, while she

[1]Reported in 128 Pac. 1068.

was in the act of alighting from one of defendant's street cars, the gripman negligently started the car with a violent lurch and jerk, throwing the plaintiff to the ground and injuring her. The case was tried to the jury and resulted in a verdict and judgment for the plaintiff in the sum of $2,597.

The defendant appeals from that judgment, and assigns that the court erred in denying the defendant's motion for a new trial, on the ground of misconduct of plaintiff of bringing her children into court and exhibiting them to the jury, and on the ground of misconduct of plaintiff's counsel in asking the plaintiff whether the children with her were her children, and also in denying defendant's motion for a new trial and in entering judgment. When the plaintiff was called to the stand as a witness in her own behalf, in answer to her counsel she stated her name and place of residence, when this examination followed:

"Q. You are a widow lady? A. Yes, sir. Q. And have been for how long? A. Two years. Q. These children are your children? A. Yes sir, two of them are and I have another boy."

No objections were made to these questions or answers, no motion was made to strike the same, and no further mention of the incident appears to have been made until the motion for a new trial. The whole contention of the appellant is that these children were brought into court and these questions were asked for the purpose of exciting the sympathy of the jury. If we should concede, for the purpose of this case, that the purpose and intent of this examination was as stated by the appellant, still we cannot reverse the cause upon that ground, for we have repeatedly held that error cannot be based upon evidence which is permitted to be introduced without objection. *Falldin v. Seattle*, 57 Wash. 307, 106 Pac. 914; *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369; *Shoemaker v. Bryant Lum. & Shingle Mfg. Co.*, 27 Wash. 637, 68 Pac. 380; *State v. McCann*, 16 Wash. 249, 47 Pac. 448, 49 Pac. 216. In *Shoemaker v. Bryant Lum. &*

Shingle Mfg. Co., supra, at page 646, in considering a remark made by the trial judge, which was claimed to be a comment upon the facts, we said:

"Since no opportunity was given the court to correct the error, if it was error, and no objection made to it until after verdict, it was too late then to raise the question."

The same is true in this case. When the question was asked, "These children are your children," no objection was made and no question raised until after the verdict. Counsel insist that the mischief was done, and an objection would have emphasized the evil effect on the minds of the jury, even though the objection had been sustained. We cannot assume that such result must necessarily follow; but on the other hand, we must assume that the jury would be guided by proper evidence and would not consider evidence which they have been told is improper. The misconduct of counsel is based upon the fact that the question was asked "These children are your children." This is clearly not misconduct of counsel within the rule, yet if it may be construed as such, the same rule applies that error cannot be based thereon unless the trial court is asked to correct it and refused to do so and an exception is saved. *State v. Bailey,* 31 Wash. 89, 71 Pac. 715; *Taylor v. Modern Woodmen of America,* 42 Wash. 304, 84 Pac. 867, and cases. Furthermore, if this question and answer were erroneous, it goes only to the question of damages, and since it is not claimed in the brief that the verdict is excessive, there is no prejudice shown. *Burger v. Taxicab Motor Co.,* 66 Wash. 676, 120 Pac. 519.

Appellant says in his brief: "The verdict of $2,597 was very large for the injuries sustained," but further than this no contention is made that the verdict is excessive. We are satisfied that the verdict is not excessive.

The judgment is therefore affirmed.

CHADWICK, CROW, GOSE, and PARKER, JJ., concur.

[No. 10490. Department One. January 3, 1913.]

PACIFIC DRUG COMPANY, *Respondent*, v. J. J. HAMILTON, *Appellant*.[1]

CORPORATIONS—ACTIONS—CONDITIONS PRECEDENT—PROOF. The corporate existence and prepayment of license fee, as a prerequisite to suit by a corporation, may be established by oral evidence, notwithstanding Rem. & Bal. Code, §§ 3682 and 3715, providing for "*prima facie*" proof by the certificate of the secretary of state.

TRIAL—EVIDENCE—OBJECTION—PRIMA FACIE PROOF. In an action upon an account assigned by a corporation, an assignment to plaintiff purporting to have been executed by the assistant treasurer of the corporation, is admissible as against the objection "that it did not tend to establish any of the allegations of the complaint."

CORPORATIONS—ACTION BY ASSIGNOR OF CORPORATION—ASSIGNED ACCOUNT. In an action upon an account assigned by a corporation, it is not a necessary prerequisite to prove the corporate existence and payment of the license fee of the assignor, which the statute makes a prerequisite to suit by the corporation, where there was *prima facie* proof of the assignment.

CORPORATIONS—REPRESENTATION—ASSIGNMENT BY OFFICER—EVIDENCE. An assignment of an account by a corporation executed by its assistant treasurer, is *prima facie* proof of the assignment.

PARTNERSHIP—SALES—PARTNERS—LIABILITY OF PARTNERS—SALES TO FIRM. An undisclosed partner in a contract to purchase goods is liable on the sale, regardless of whether the sale was made upon the faith of his credit or with knowledge of the partnership relation.

Appeal from a judgment of the superior court for King county, Myers, J., entered February 3, 1912, upon findings in favor of the plaintiff, in an action on contract, after a trial to the court. Affirmed.

Harrison B. Martin, for appellant.

Trefethen & Grinstead, for respondent.

PARKER, J.—This is an action to recover, upon one cause of action, the purchase price of goods sold and delivered by the plaintiff, Pacific Drug Company of Seattle, to the defend-

[1]Reported in 128 Pac. 1069.

ant; and also to recover upon another cause of action the purchase price of goods sold and delivered by Lowman & Hanford Company of Seattle, to the defendant, the claim of the latter being assigned to the plaintiff before the commencement of the action. The trial was before the court without a jury. The defendant moved for nonsuit at the close of the plaintiff's evidence; which motion being denied, he rested without offering any evidence, and thereupon findings and judgment were entered against him, from which he has appealed.

The only evidence introduced to prove the corporate existence of respondent, and the payment of its license fee, was the testimony of P. S. Norton, who testified that he was then its president; that it was then a Washington corporation, and that its license fee was then paid. Counsel for appellant contends that this was not competent proof of the corporate existence of respondent, nor of the payment of its license fee. Counsel seem to rely upon §§ 3682 and 3715, Rem. & Bal. Code, which provide for making "*prima facie*" proof of corporate existence and payment of the license fee by certificate of the secretary of state. Neither of these sections, however, makes this mode of proof exclusive. We have heretofore held that corporate existence may be proven by oral testimony. *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834; *National Bank of Commerce v. Galland*, 14 Wash. 502, 45 Pac. 35; *Stanford Land Co. v. Steidle*, 28 Wash. 72, 68 Pac. 178; *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042; and that payment of license fee may be proven in the same manner; *Miller & Sons v. Simmons*, 67 Wash. 294, 121 Pac. 462. We conclude that Mr. Norton's testimony was sufficient to show the corporate existence of respondent, and also that its license fee had been paid.

Counsel for appellant also contend that the second cause of action must fail for want of proof of the corporate existence of Lowman & Hanford Company and payment of its license fee. While the corporate existence of Lowman & Hanford

Company is alleged in the complaint, we do not find in the record any evidence thereof, except such inference, possibly binding upon appellant, as may be drawn from the fact that the goods were purchased from Lowman & Hanford Company under that name, which it may be said suggests a dealing with it on the part of appellant as a corporation, and therefore obviates the necessity of proof of its corporate existence by respondent as against appellant. However this may be, there was introduced in evidence an assignment of the account of Lowman & Hanford Company here sued upon to the respondent, purporting to have been executed by its assistant treasurer. The only objection made to the introduction of this assignment in evidence was that "it does not tend to establish any of the allegations of the complaint." It clearly was admissible as against such a general objection, and was at least *prima facie* proof of the fact that Lowman & Hanford Company parted with the right to receive payment from appellant for the goods, whether it was a corporation, a partnership, or an individual doing business under that name. That concern, whatever its legal status, is not suing in this action, and we think that, in view of the *prima facie* showing of the assignment of its interest in the account to the respondent, the question of its corporate existence becomes of no further consequence here. There is no question here involved as to Lowman & Hanford Company's right to maintain an action as a corporation. We are only concerned with the question of that concern having assigned its claim to respondent, which we think the proof *prima facie* shows. The fact that that concern is not suing in this action also obviates the necessity of our inquiring into the question of the payment of its license fee as a corporation.

Respondent sought recovery from appellant upon the theory that he was at all the times involved a partner in the concern to which the goods were sold and delivered by respondent and Lowman & Hanford Company, the goods being sold and delivered by them to a concern doing business in

Alaska under the name of Red Cross Drug Company. The challenge of appellant's counsel to the sufficiency of the evidence, except as to the questions we have before noticed, relates only to the alleged insufficiency of the evidence to prove this partnership relation of appellant in the Red Cross Drug Company. We deem it sufficient to say that a careful reading of the evidence convinces us that such relation was fully established thereby, especially in view of statements made in letters addressed by appellant to respondent and by appellant to one Mrs. King, his partner in the business conducted under the name of Red Cross Drug Company. We not only find in these letters expressions clearly indicating his partnership relation, but in one of them he speaks of "my share of the profits," clearly referring to his contemplated share of profits in the business.

Counsel for appellant make some contention upon the theory that neither respondent nor Lowman & Hanford Company extended credit to the Red Cross Drug Company, for the goods sold, upon the faith of appellant's being a partner in the business conducted under that name, and that neither knew until after the sale and delivery of the goods that appellant was such partner. This action was not prosecuted by respondent upon the theory that appellant made a direct personal promise to pay for the goods, either before or after their sale and delivery; but upon the theory that he was in fact a partner in the business when the goods were sold and delivered, and thereby became liable through the purchase and receipt of the goods by the Red Cross Drug Company. Since appellant has been found to be such partner, it is immaterial that respondent and Lowman & Hanford Company did not know he was such partner at the time of the sale of the goods to the Red Cross Drug Company. The rule applicable to such cases seems to be well settled, as stated in the text of 30 Cyc. 532, as follows:

"The rule that an undisclosed principal is liable for contracts made, or goods purchased, or benefits secured for him

by his agent, applies to a case where there is an undisclosed or dormant partner."

There is no controversy here as to the goods being sold to the Red Cross Drug Company by respondent and Lowman & Hanford Company, nor as to the amounts due therefor. Other suggested errors, we think, do not require further notice.

The judgment is affirmed.

MOUNT, C. J., CHADWICK, GOSE, and CROW, JJ., concur.

[No. 10670. Department One. January 3, 1913.]

SOUND TRANSFER COMPANY, *Appellant*, v. PHINNEY REALTY & INVESTMENT COMPANY, *Respondent*.[1]

MECHANICS' LIENS—LIENABLE ITEMS—LABOR PREPARATORY TO CONSTRUCTION. Rem. & Bal. Code, § 1129, giving a lien to every person performing labor in the construction, alteration or repair of any building, applies only to labor that goes into the finished structure, and does not cover labor in wrecking and removing a building on the lot preparatory to the construction of the new building, although that work was included in the contract for the new building.

SAME. A lien for labor in wrecking and removing an old building on a lot preparatory to the erection of a new building cannot be claimed under Rem. & Bal. Code, § 1131, giving a lien to any contractor who clears, grades, fills in or otherwise improves the same.

Appeal from a judgment of the superior court for King county, Myers, J., entered January 12, 1912, upon agreed facts, dismissing an action to foreclose a mechanics' lien. Affirmed.

Peterson & Macbride, for appellant.

James B. Howe and *Hugh A. Tait*, for respondent.

PARKER, J.—The plaintiff seeks foreclosure of a lien upon a lot and building in the business district of Seattle belonging

[1]Reported in 128 Pac. 1047.

to the defendant, for hauling away from the lot the debris of a building which was torn down preparatory to the construction of a new building thereon. From a judgment denying the relief prayed for, the plaintiff has appealed.

The facts are agreed upon. Respondent, the owner of the lot, entered into a contract with Stone & Webster Engineering Corporation for the construction of an office building thereon, including the wrecking and removal of a building then situated upon the lot preparatory to the construction of the new building. Appellant was employed by a subcontractor of the engineering corporation to remove and haul away the debris of the wrecked building. It performed this work, and not being paid therefor, claims a lien upon the lot and new building securing the amount so earned, and prays for foreclosure of its lien.

It is first contended by appellant that its right to a lien is secured by Rem. & Bal. Code, § 1129, which provides:

"Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any . . . building, . . . has a lien upon the same for the labor performed or material furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien or his agent."

This court has consistently adhered to the doctrine that the purpose of this provision is to secure a lien to the laborer and materialman for that which is furnished to go into the finished structure. It is true we have given expression to this view, for the most part, in cases involving material only; but we think it is equally applicable to labor. *Vendome Turkish Bath Co. v. Schettler*, 2 Wash. 457, 27 Pac. 76; *Armour & Co. v. Western Const. Co.*, 36 Wash. 529, 78 Pac. 1106; *Fuller & Co. v. Ryan*, 44 Wash. 385, 87 Pac. 485; *Tsutakawa v. Kumamoto*, 53 Wash. 321, 101 Pac. 869, 102 Pac. 766; *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912 B. 225; *National Surety Co. v. Bratnober Lum. Co.*, 67 Wash. 601, 122 Pac. 337. We are of the opinion

that the labor performed by appellant was not performed upon any building being constructed upon respondent's lot, and did not go into or become a part of such building.

Counsel for appellant makes some contention which they rest upon the fact that the wrecking and removing of the first building was included in the contract between respondent and the engineering corporation for the construction of the new building. It seems clear to us, however, that a non-lienable item cannot be rendered lienable by including it in a contract for the furnishing of work or material which is lienable. The lien arises by virtue of the statute. It of course arises in a sense out of the contract, but not by virtue of any contract for the lien. The lien exists, if at all, only by force of the statute as an incident to the contract; hence the lienable nature of each item is determined by the statute regardless of how it may be included in a contract with other items.

It is finally contended by counsel for appellant that it has a right to a lien under Rem. & Bal. Code, § 1131, which provides:

"Any person who, at the request of the owner of any real property, his agent, contractor or subcontractor, clears, grades, fills in or otherwise improves the same, . . . has a lien upon such real property for the labor performed."

We are of the opinion that the work performed by appellant does not come under any of the designations of work mentioned in this section.

We conclude that the judgment of the trial court must be affirmed. It is so ordered.

MOUNT, C. J., CHADWICK, GOSE, and CROW, JJ., concur.

[No. 10626. Department One. January 8, 1913.]

Paul Stueding, *Respondent*, v. Seattle Electric Company, *Appellant*.[1]

Street Railways—Accidents at Crossings—Contributory Negligence of Pedestrians—Evidence—Sufficiency. The contributory negligence of a pedestrian, struck by a street car, precludes any recovery, as a matter of law, notwithstanding negligence on the part of the company in excessive speed, where it appears that he approached a street car crossing where a car was unloading passengers, with an unobstructed view of the far track where he could have seen an approaching car, that he did not look in that direction until near the standing car, which then obstructed his view, and walked rapidly behind the standing car without stopping to look, and was struck by the side or front end of a car passing on the other track.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 26, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by a pedestrian struck by a street car. Reversed.

James B. Howe and *A. J. Falknor*, for appellant.

Robert Grass and *Ralph A. Horr*, for respondent.

Gose, J.—The defendant operates a double track electric street railway, known as the Eastlake line, on Fourteenth avenue northeast, in the city of Seattle. The avenue runs north and south, and is intersected by East Forty-seventh street, which runs east and west. The outbound car runs on the east track and the inbound car runs on the west track. The distance between the east rail of the east track and the curb on Fourteenth avenue is thirteen feet, seven inches. The distance between the rails of the respective tracks is four feet, eight and one-half inches. The distance between the tracks is five feet, one inch; and the clearance between bodies of passing cars is sixteen inches.

[1]Reported in 128 Pac. 1058.

On March 26, 1911, at about the hour of 6:45 in the afternoon, the plaintiff was returning to his fraternity house, situated at the northwest corner of Fourteenth avenue northeast, and East Forty-seventh street. He traveled west upon the north side of East Forty-seventh street, walking rapidly until he reached the sidewalk or curb on Fourteenth avenue, where he says he slowed to an ordinary walk. The outbound car had stopped at or about the north line of Forty-seventh street and was discharging passengers. He proceeded toward the standing car until he was about midway between the curb and the east track, looked north, then continued west, passing about four feet to the rear of the standing car, when he was struck by the inbound car as he emerged from behind the standing car, and received the injuries which form the basis of this suit.

The avenue and the street intersect in a thickly settled residential district. Fourteenth avenue north of the point of intersection runs straight. It is comparatively level, and cars to the north are in open view for several blocks when there is no obstruction to the line of vision. The houses upon the east side of Fourteenth avenue are back some distance from the sidewalk. The plaintiff and his witnesses say that it was twilight or dusk when he met his injury. When he had reached a point twenty or thirty feet from the sidewalk on Fourteenth avenue, there was nothing to obstruct his view to the north, and had he looked to the north at any place between that point and the curb he could have seen the south-bound car. His witnesses estimate the speed of the south-bound car at from fifteen to twenty-five miles per hour, and either say that they heard no bell or other warning, or that no bell was rung and no warning given. The speed limit on that line was twelve miles an hour. The plaintiff was twenty years of age, a university student, had lived in the fraternity house about two weeks and in the city about five months, and was familiar with the location of the tracks and the manner in which the cars were run on Fourteenth avenue. There was a

verdict and judgment for the plaintiff, and the defendant has appealed.

The only point pressed by the appellant is that the respondent was guilty of contributory negligence, and hence that it incurred no liability. The respondent's evidence may best be stated in his own language. He says:

"A. Well, I had been over to my own home at 17th avenue Northeast for dinner; and I left there about six-thirty, to go to my fraternity house on 47th and 14th avenue Northeast; and I went up 17th avenue to 47th, and then down the north side on the sidewalk of 47th avenue or 47th street; and when I came to 14th avenue there was a car standing there and the passengers were getting off; and as I stepped from the curb I glanced down the street and the automobile was approaching. I did not stop but I immediately glanced up 14th, and then passed around back of this car which was standing there, and as I stepped out back of the standing car I was struck by the inbound car, and after that I do not know anything; I do not know what happened. . . . I looked to the north just after I looked to the south; my attention was naturally directed to the south on account of this automobile and I was probably half way between the car and the sidewalk when I glanced to the north . . . Q. And when you got about half way between the curb and the track you looked north? A. Yes; my attention was naturally directed south on account of the automobile. Q. That kept you from looking when you looked to the north, the car standing there obstructed your view of the approaching car? A. It did for a short ways. Q. Anyway, as you looked to the north it obstructed your view so you could not and did not see the car coming on the opposite side of the standing car? A. Well, I saw a car further up the track but that did not obstruct the whole view. Q. But anyhow it naturally did obstruct your view of the car which was coming? A. To a certain extent, yes. Q. And you did not see the car, did you? A. No, sir, I did not see the car. Q. Then you walked hurriedly around the rear of the car? A. I walked around the rear of the car. Q. The car was standing still all the time? You did not wait until the car discharged the passengers and moved out of your line of vision? A. No, I did not. Q. You went around, how close to the rear of the

car did you go? A. I should judge it was about four feet. . . . . Q. Now when there are no cars to obstruct your vision, you can see north of that block, probably a quarter of a mile, can't you? A. Several blocks, I don't know how far. Q. Have you any recollection as to your having come into contact with the car? A. Except as of course it all happened in a second, and I had the sense of being struck, but it was too late. Q. When you got back of the rear of the car, you did not stop and look around the rear of the car? A. I did not. Q. You kept right on going? A. I did. Q. The only time you looked to the north was the time that you were about half way between the curb and the car? A. That is the time I remember of looking for cars, and the only time too. Q. That is the only time you remember of looking, is it not? A. Yes. That is in the street. Q. At that time a car was standing there? A. Yes. Q. Now, you don't know what portion of the car came in contact with you, do you? A. No. I cannot state specifically what part of the car came into contact with me. Q. You seemed to have the realization of it when you went around the rear of the car; at that instant there was a car there? A. I was too far gone to get out of the road. Q. Well, you could see as you left the sidewalk, you could see a considerable distance north, couldn't you? A. I could. Q. And if one looked close to the sidewalk, his line of vision would be increased to the north? A. That is, on the hill? Q. Now, that is on the level? A. Well, coming down? Q. Yes, as one comes down the sidewalk, as he approaches the sidewalk, his line of vision would continually increase to the north? A. Yes. Q. On account of looking over that way? A. Yes. Q. When you stopped there, about half way between the sidewalk and the curb, the standing car was within five or six feet of you? A. When I stopped? Q. I mean when you say you looked to the north, the standing car was within five or six feet of you? A. Something like that; I don't know the exact number of feet, three or four or five feet; something like that. Q. It was daylight at the time? A. It was about six-thirty, I should judge, it was just getting dusk. Q. Yes; but it was daylight so that you could see all around without any difficulty. A. You could see as much as you can at any time at that time. Q. At that time it is not dark; it is daylight? A. It is not dark, no; but it is a kind of a twilight; it is not

exactly daylight. Q. Now, there was nothing to prevent you seeing cars or anything of the kind, or the automobile? A. No, sir."

The automobile to which respondent alluded stopped south of the southeast intersection of the avenue and the street. There were no obstructions to the north other than the standing car, and none to the south other than the automobile, and nothing else to distract his attention. The cars on that line are about forty-seven feet in length. Thomas Boyd, the driver of the automobile, a witness for the respondent, says that the respondent was "moving rapidly," "running" along the north side of Forty-seventh street, when he first observed him; that he was looking at the respondent when the car struck him; and, in answer to the question, "Was he walking, slow or fast?" answered, "I would say he was moving rapidly." The witness says: "He was struck by the heavy piece of timber covered by iron just along the front" of the car. Mrs. Williams, a witness for the respondent, observed the accident from the front window of her home immediately east of where the automobile was standing. She said that her view was clear; that she saw the respondent as he passed to the rear of the standing car; that she "followed his movements;" that he was "walking rapidly," and that "it was not the fender that struck him" but some portion of the side of the car. The respondent's testimony is clear to the point that he did not reach the west car track and that he collided with some projection upon the car near its front corner. The respondent is markedly frank in all his statements and there can be no doubt that he has narrated the events leading up to the catastrophe precisely as he recalls them.

The appellant's witnesses say that the car was traveling at a speed of from four to six miles an hour, and that the bell was ringing when it passed the standing car. The jury, however, was warranted in finding that the car was traveling at a speed of from fifteen to twenty-five miles an hour, and

that it gave no warning of its approach. This clearly established the appellant's negligence.

We think the contributory negligence of the respondent is equally manifest. Upon his own testimony, and there is none more favorable from his point of view, he was guilty of the most pronounced negligence. If he had used his powers of observation at any time after he was within twenty feet of the sidewalk on Fourteenth avenue and before he had stepped from the curbing to the street, he would have had a clear view to the north for several blocks and would have seen the approach of the offending car. He not only failed to do this, but looked at a point where he knew his view was obstructed and failed to use his senses before entering the danger zone from behind the standing car. One cannot read his testimony without being impressed with the fact that he continued his course utterly oblivious to the dangers which he knew he might encounter at any moment. One of his witnesses, who alighted from the outbound car at Forty-seventh street, says that he saw the south-bound car through the window of his car when it was nine hundred feet north of the street intersection. It is a fact, well known to all who have observed the operation of electric cars, that they may be heard for a considerable distance, and that the noise which they make increases as the speed of the car increases. This court, in harmony with many other courts, has taken the view that it is not ordinarily negligence *per se* for a traveler to fail to "stop, look, and listen" before crossing a street car track. But it has never held that he may go upon a street car track where the conditions are such as to suggest grave danger without taking any precautions whatever for his own safety. These views find firm support in *Hellieson v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458; *Mey v. Seattle Elec. Co.*, 47 Wash. 497, 92 Pac. 283; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471; *Borg v. Spokane Toilet Supply Co.*, 50 Wash. 204, 96 Pac.

1037, 19 L. R. A. (N. S.) 160; *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51; *Slipper v. Seattle Elec. Co.*, *ante* p. 279, 128 Pac. 233.

In the *Helliesen* case, we said:

"Pedestrians in crossing the tracks of a street railway in the day time or in the night time, knowing, as respondent knew, that the crossing was one where cars frequently passed, must use their senses to apprise them of danger, if any; they cannot heedlessly and carelessly cross the track, and throw the entire burden of their safety upon the motorman of any approaching car. The rights of the pedestrian and that of the street railway are equal. Their duties are reciprocal. Neither has the exclusive right of way; each must have due regard to the rights of the other."

In the *Mey* case, we said:

"This being true, it seems plain that it was the duty of the appellant, while traveling in close proximity to this track in a place where he testifies he knew that cars were passing at short intervals, to have exercised the ordinary caution of noticing, when he passed those points where there was not room for both man and car, whether there was any car which was liable to injure him. According to the testimony, the track was on an open, paved street where the slightest observation would have discovered the approach of a car. Not having exercised this ordinary caution, we think the plaintiff was undoubtedly guilty of contributory negligence."

In the *Dimuria* case, the plaintiff while crossing a street, carrying an umbrella over his head, without keeping a lookout, was struck by a team of horses and injured. In applying the law to such facts, the court said:

"From all of the evidence we are compelled to hold that the respondent was guilty of contributory negligence, as a matter of law, in failing to look for approaching teams or to take any other precaution for his personal safety. . . ."

It has been held in other jurisdictions with seemingly unanimity that one who passes behind a standing street car where there is a parallel track, without using his senses, will not be allowed to recover if he is injured by an approaching

car. The same rule obtains where the traveler takes observations from a point where he knows that his view is restricted and then heedlessly passes into the zone of danger. *Morice v. Milwaukee Elec. R. & Light Co.*, 129 Wis. 529, 109 N. W. 567; *Kennedy v. Worcester Consol. St. R. Co.*, 210 Mass. 132, 96 N. E. 78; *Hageman v. North Jersey St. R. Co.*, 74 N. J. L. 279, 65 Atl. 834; *Shuler v. North Jersey St. R. Co.*, 75 N. J. L. 824, 69 Atl. 180, 127 Am. St. 834; *Greengard v. St. Paul City R. Co.*, 72 Minn. 181, 75 N. W. 221; *Reed v. Metropolitan St. R. Co.*, 180 N. Y. 315, 73 N. E. 41; *Baltimore Traction Co. v. Helms*, 84 Md. 515, 36 Atl. 119, 36 L. R. A. 215; *Doty v. Detroit Citizens' St. R. Co.*, 129 Mich. 464, 88 N. W. 1050; *Foreman v. Norfolk, Portsmouth & Newport News Co.*, 106 Va. 770, 56 S. E. 805.

The respondent seems to rely chiefly upon *Richmond v. Tacoma R. & P. Co.*, 67 Wash. 444, 122 Pac. 351, and *Merwin v. Northern Pac. R. Co.*, 68 Wash. 617, 123 Pac. 1019. In the *Richmond* case, the plaintiff looked north when forty-five feet from the car track, where he had a clear view of the track for two hundred feet and saw no car. We held that he had a right to assume that the motorman would observe the municipal regulations, and that whether it was negligence for him to proceed upon the assumption that he could cross the track in safety without taking further observations was a question for the jury. In the *Merwin* case, the plaintiff stopped within a few feet of the southerly railroad track, when he looked and could see the track to the east for a distance of fifteen hundred or two thousand feet. He then started his team and was struck by the west-bound train upon the northerly track. Upon these facts, we held that it was for the jury to determine whether he was guilty of contributory negligence. Common prudence demanded that the respondent should take his observations at a point where his vision was not restricted, and that if he failed to do so he should not pass behind the standing car and enter the zone

of danger without using his senses to ascertain whether there was an approaching car upon the west track.

The judgment is reversed, with directions to dismiss.

Mount, C. J., Chadwick, Crow, and Parker, JJ., concur.

[No. 10931. *En Banc.* January 3, 1913.]

The State of Washington, *on the Relation of G. W. Sampson, Plaintiff*, v. The Superior Court for King County, *Respondent*.[1]

Elections—Special Election — Notice — Necessity. Where no notice of a special election to fill a vacancy was given, as contemplated by statute, and a candidacy therefor was kept secret, thirteen votes by stickers, out of a total of thirty-two thousand electors voting for other officers at the general election, held at the same time, is not such an expression of the popular will as to amount to an election to such office, or such as would dispense with the necessity of giving notice of the special election for that office.

Certiorari to review a judgment of the superior court for King county, Albertson, J., entered November 29, 1912, dismissing an action for a mandamus to secure a certificate of election. Affirmed.

Kitt Gould, for relator.

John F. Murphy and *Robert H. Evans*, for respondent.

Morris, J.—Relator sought a writ of mandate in the lower court, requiring the county auditor to issue to him a certificate of election to the office of judge of the superior court of King county, for a short term, beginning November 5, 1912, and ending January 13, 1913. The writ was denied below, and relator now comes to this court and sues out a writ of certiorari to review the action of the lower court.

There is no dispute as to the facts. At the last general election in King county, nine judges of the superior court

[1]Reported in 128 Pac. 1054.

were elected for the full term commencing January 13, 1913. Four judges of that court were then serving by executive appointment; one being appointed to fill an additional judgeship created by the last preceding legislature, two being appointed to fill vacancies created by resignation, and one to fill a vacancy created by death. The only notice or call for the election of judges was that of the general election at which nine were to be elected for the full four-year term. Relator, holding the opinion that, under the Constitution, art. 4, § 5, providing that, in case of a vacancy "in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election; and the judge so elected shall hold office for the remainder of the unexpired term," the term of these appointed judges expired at the general election on November 5, caused stickers to be printed and distributed among his friends, reading: "For judge of the superior court of King county, Washington, for the short term from November, 1912, to January, 1913, G. W. Sampson." Thirteen ballots containing these stickers were voted. Relator filed no declaration of his candidacy with the county auditor prior to the primary election held in September, and received at that election no votes placing him in nomination for the office of judge; neither did he attempt to have any notice of his candidacy given, other than the distribution of these stickers. In fact, he admits on the argument here that he sought the utmost secrecy in announcing his candidacy, and that his efforts outside of the distribution of these stickers were devoted to concealing rather than extending notice of his candidacy. That the electors were generally ignorant of the fact that they were to be called upon to elect a successor to any of these appointed judges, for a short term between the date of the general election and the beginning of the regular judicial term on the second Monday of the following January, is evident from the fact that, out of the 391 voting

precincts in the county, votes were cast for relator only in seven precincts, and that out of approximately thirty-two thousand judicial ballots cast in the county for judges of the superior court, relator received only thirteen votes.

A number of interesting legal questions are submitted to us by the briefs and arguments; but, as we view it, one is so determinative of the relator's rights that it, only, need be discussed, and that is the lack of notice. It will be conceded that, while the election of November 5 was, so far as it related to state, county and precinct officers, a general election, called and held pursuant to the required notice, any election, although held at the same time and place to fill any vacancy in any office, would be a special election under § 4782, Rem. & Bal. Code, providing that "Special elections are such as are held to supply vacancies in any office, whether the same be filled by the vote of the qualified electors of the state, or any district, county or township, and may be held at such times as may be designated by the proper officer." The last clause would seem to indicate that, whenever a special election is to be held, the time for holding such an election shall be designated by the proper official. This is borne out by § 4784, providing that at least fifteen days' notice shall be given of any special election, by posting notices.

Relator seeks to evade the lack of notice in this instance by a contention that notice is directory merely, and any failure to give it would not render an election void, and cites *Seymour v. Tacoma*, 6 Wash. 427, 33 Pac. 1059, and *Hesseltine v. Wilbur*, 29 Wash. 407, 69 Pac. 1094. In both of these cases notice was given. In the first case the notice was less than the required time, while in the latter case it was published thirty days when the statute required a publication of only ten days; and in both cases it was held "that the formalities of giving notice, although prescribed by statute, are directory merely." It will be noted in examining those cases that in neither of them was any suggestion made in the complaint that the electors did not have sufficient notice of the

election, and knowledge of the propositions to be voted upon, to act and vote intelligently, which is the primary reason for requiring notice. In the *Seymour* case, it is said that the complaint "does not contain a single word to the effect that in any respect the election was otherwise than a fair, full and free expression of the popular will;" and Dillon on Municipal Corporations, § 197, n. 3, is quoted to the effect that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election. Neither is any question suggested in the *Hesseltine* case, but that the electors were fully informed of the questions to be submitted to them, and of the time and place when they would be called upon to express their will. Rather does the contrary appear, from the fact that all but eight electors voting at such election voted in favor of the proposition submitted. It is apparent from a glance at the facts submitted here that the same reasoning inducing the court to hold that in each of those cases the irregularity in the notice did not prevent a full and fair expression of the popular will, could hardly obtain in a case where only thirteen out of over thirty-two thousand electors had apparently any information or knowledge that they were called upon to elect a judge of the superior court for a short term between November 5 and January 13 following. Such an expression could hardly be said to be an intelligent expression of the popular will, which is the real test moving all courts in holding that, unless the contrary appears, mere irregularities should not be held to defeat and set aside the popular will. This is clearly pointed out in *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. 39, where it is said:

"The rule established by an almost unbroken current of authority is that the particular form and manner pointed out by the statute for giving notice is not essential, and where the great body of the electors have actual notice of the time and place of holding the election, and of the questions submitted, this is sufficient. The vital and essential question in

all cases is whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election."

The same rule is announced in *Murphy v. Spokane*, 64 Wash. 681, 117 Pac. 476, where it is said:

"The purpose of an election, whether for men or for measures such as the one before us, is to give effect to the voice of the people; and when the people have spoken, their verdict should not be disturbed by the courts, nor the election in which they have voiced it held void unless it is clearly so."

Reference is then made to McCrary on Elections, § 225, for the proper test in determining whether the omission of any particular requirement not made mandatory by the express language of the election statute shall render the election void, and this test is said to be that the requirements of the statute are to be held mandatory if they do, and directory if they do not affect the actual merits of the election. These authorities are almost conclusive against the validity of this election, without notice of any character. It would be ridiculous to say that, under the circumstances here shown, the voice of the people had spoken and it was the duty of the court to give effect to that voice, or that the omission of notice did not affect the actual merits of the law's requirement that the result shall show that the election gave to each elector an opportunity to cast an intelligent vote. We could hardly assume that, in a county where over thirty-two thousand electors had expressed a choice as between eighteen different candidates for the office of superior judge, only thirteen of those electors were interested in expressing a choice for a judge of that court for the term for which relator claims to have been elected.

Relator cites no case where any court has departed from the reasoning we have given. The authorities relied upon by him, where failure of notice has been held not to invalidate an election, are cases where it is apparent from the facts that the

failure to give notice did not prevent a fair expression of the popular will, as in *State ex rel. Malloy v. Skirving*, 19 Neb. 497, 27 N. W. 723, where the court says:

"Here it seems to have been generally understood by the electors of the county that a vacancy existed, and they sought to fill said vacancy, nearly all those voting at that election casting their ballots for one of the candidates named;"

or *State v. Thayer*, 31 Neb. 82, 47 N. W. 704, where, although no special election was called to elect a judge to fill an unexpired term created by the resignation of the incumbent, the several political parties made regular nominations of candidates for such office, and it was stipulated that the electors voted for such candidates for such office. Reliance is also had upon *City of Lafayette v. State ex rel. Jenks*, 69 Ind. 218, where it was held that, under an act authorizing cities to construct water works and providing for the establishment by the common council of a board of three trustees, and for the election of such trustees, the establishment of such a board was not a necessary prerequisite to the election of the three trustees, and that want of notice of the election did not nullify the election. The opinion proceeds upon the theory that the fact that the people were ignorant of the law and its provisions could not invalidate the election because it was ignorance of a matter of law rather than one of fact, and that the people were bound to take notice of the existence of the law, and of the election of trustees to be held under it. The court then proceeds to distinguish ignorance of law from ignorance of fact in such cases, and as illustrating ignorance of fact, *Foster v. Scarff*, 15 Ohio St. 532, is cited, a case where a probate judge had died in office, and the governor had made an appointment to fill the vacancy. Afterwards a general election was held, at which it was proper to elect a probate judge. Proper notice was given of this election, but the office of probate judge was not included in the notice. The great mass of voters were ignorant of the fact that any one was being voted for for probate judge, until about three

o'clock on the day of the election, and Foster, the plaintiff, who claimed the election, received less than one-quarter of the votes cast at that election. The election was declared invalid. The Indiana court says this was a proper decision, because in that case the ignorance was one of fact, and the voters were bound to know that the term of office of probate judge was three years—that was a matter of law; but they were not bound to know when the office had been filled, and when the incumbent's term would expire—that was a matter of fact. The other case there cited as illustrating ignorance of fact is *State ex rel. Chase v. McKinney*, 25 Wis. 416, where the fact that a vacancy existed in a county office was not known to any considerable portion of the electors of the county, and no public notice was given before the election, officially or otherwise, that such office was to be filled; and the great body of the electors, voting for other offices, did not vote for any person to fill said office, and it was held that the election was invalid. If we accept the Indiana court's ruling as authoritative, there would seem to be no question but that the case before us falls within the exception as a mistake of fact rather than one of law. It would be hard to distinguish the Ohio case and the Wisconsin case from the one at bar. The authorities leave little doubt as to the proper rule of law to be applied in cases of this character. In *People v. Porter*, 6 Cal. 26, involving an election to fill a vacancy in the office of county judge, the law there providing that vacancies in such offices shall be filled by election at the next general election after the vacancy occurs, and that notice of election shall be given, no notice was given and it was held the election was void on that account. The court concedes the general rule that the requirement of notice is directory, and that failure to give such notice will not vitiate an election, and then holds that such rule applies only to general or regular elections, and says:

"But it has nowhere been decided that such notice is not essential to the validity of all special elections. . . . It

is essential to the proper exercise of the elective franchise, that the voters should be informed of the offices in which vacancies have occurred, before each general election in order that they may select fit and proper persons to perform the duties of such offices."

The court then evidences the necessity for so holding by referring to the fact that more than four thousand votes were cast at the election, but only twelve hundred were cast for the office in question. If such reasoning impelled that court to so hold, what should be said of a judicial election where more than thirty-two thousand votes were cast out of which the claimant received thirteen? Another California case is *People ex rel. Leverson v. Thompson*, 67 Cal. 627, 9 Pac. 833, where it is said:

"Notice to the electors lies at the foundation of any popular system of government. It has sometimes been held that the existence of a law fixing the time of an election, and the offices to be filled, is of itself notice. It may be conceded that when a term of office is to expire at a certain date after a general election, no other election to intervene, the electors take notice the office is to be filled at such general election. Some decisions have gone so far. But it is well settled that when a vacancy has occurred by reason of death or resignation, the voters are not bound to take notice of such vacancy, and the casting of votes for a candidate or candidates to fill the vacancy does not constitute an election."

State ex rel. Bolton v. Good, 41 N. J. L. 296, lays down the same rule. *Cook v. Mock*, 40 Kan. 472, 20 Pac. 259, holds notice essential in case of special elections to fill vacancies, and says:

"The electors may well be presumed to know when the regular terms of city offices begin and end. They usually do know it, in fact, but in respect to vacancies it is entirely different."

People v. Kerwin, 10 Colo. App. 472, 51 Pac. 530, is a similar case, as is also *Secord v. Foutch*, 44 Mich. 89, 6 N. W. 110. In *Wilson v. Brown*, 22 Ky. Law 708, 58 S. W. 595, we have a case very similar to the one before us. An election as

circuit judge of Kentucky was claimed by one who had provided stickers to be voted at a general election, at which time the office was being held by one who had been appointed to fill a vacancy. There was no notice, and the people were ignorant of the fact that such an office was to be filled. The court, after laying down the general rule referred to in the foregoing cases, uses this very pertinent language:

"Under this rule, it seems clear to us the election of appellant must be held void on the facts stated in the answer. The constitution requires the circuit judges to be elected by the people, and it contemplates that they shall have a fair opportunity to express their choice in the selection of this officer, in many respects the most important to them of all the officers for whom they vote. It would be a manifest perversion of the constitution to allow a man to secure this office on the vote of 94 persons out of a total of something like 12,000, by means of pasters stuck on the original ballots, when there had been no proclamation for the election, and the voters were in ignorance that the office was to be filled."

Many more cases might be cited, but it seems to us so clear that this election claimed under such circumstances, cannot be upheld that we refrain from longer discussion. Relator's candid assertion that he sought secrecy rather than publicity, and that his endeavor was to keep the knowledge of his candidacy away from the people rather than impart it to them, in order that he might have no contest, and that the votes of the few friends to whom he confided his scheme, might be sufficient to insure his elevation to such an important office, with the receipt of thirteen votes out of thirty-two thousand ballots cast, puts this case within the rule we have asserted upon stronger reasoning than any case we have examined. If an election could be upheld under such circumstances, then those laws which seek to make the matter of elections one of great general public moment, in order that the people may have the fullest opportunity to intelligently select those who shall rule over them, might as well be read out of the law. Relator cites *State ex rel. Harvey v. Mason*, 45 Wash. 234, 88 Pac. 126,

as authoritative of his contention that notice was unnecessary. That case, however, when properly read, can bring him no comfort, notwithstanding the fact that the election was sustained without notice. The election there sustained was the regular municipal election held on the day provided by law for the election of officers in cities of the third class. The city council neglected to cause notice of the election to be given. The citizens, however, held a mass convention at which nominations were made for the various municipal offices, and on the day of the election the citizens generally participated in the election. The only question presented to the court was an application for an order requiring the mayor and common council to canvass the returns and declare the result, which order was granted below and sustained here. The sufficiency of the election was not before the court. It was, however, said that:

"If the election should be void because of the neglect of the city's officers, it would result in those officers perpetuating themselves in office of their own volition and against the expressed will of the people."

that they had no "judicial prerogative of determining that the election held by the people at the time fixed by law is void;" and that their duties were purely ministerial. That case is in perfect harmony with the views we now express and the cases we cite in support of our holding, for the reason that the election was held at the time fixed by law to elect officers, who under the law were then required to be elected. The electors, as is said in *Cook v. Mock*, *People ex rel. Leverson v. Thompson*, *supra*, and the other cited cases, were presumed to know when the regular term of their municipal officers expired. That was, as is said in *Lafayette v. State*, *supra*, knowledge of a matter of law of which courts would presume the people had full knowledge. It was not, as that court also says an instance of a vacancy in office, which would be a question of fact concerning which knowledge would not be presumed. It also appears in that case that the people had

actual knowledge of the election and generally participated therein so that none of the reasoning applied to the facts before us would suggest a different holding from the one there made. The rule which we now announce and the *Harvey* case need no distinguishing, for they proceed along different lines and are based upon different facts. Neither is it necessary for us to refer to *State ex rel. Linn v. Millett*, 20 Wash. 221, 54 Pac. 1124; nor to *State ex rel. Murphy v. McBride*, 29 Wash. 335, 70 Pac. 25, to discuss whether or not there were vacancies in these four judicial offices which it was required should be filled at the November election; since the only question we have to determine is whether or not relator was duly and properly elected to fill one of these vacancies. If he was not, then it is immaterial how long the appointed judges held office under their appointment since, whatever the time was, they would hold until their successors were duly elected and qualified. Relator was, for the reasons we have given, not "duly elected" as a successor to either of them, and no other holding is required.

We feel that we have said all that is required to be said to sustain our ruling and the judgment is affirmed.

Mount, C. J., Crow, Parker, Gose, Fullerton, and Chadwick, JJ., concur.

Main and Ellis, JJ., took no part.

[No. 10877. *En Banc.* January 4, 1913.]

The State of Washington, *on the Relation of Jennie Sargent, Plaintiff*, v. The Superior Court for King County, *Everett Smith, Judge, Respondent.*[1]

Appeal—Bonds—Supersedeas—In Aid of Execution—Amount—Contempt. Under statutes giving ample power to the court to enforce its judgments by execution against the person and to order commitment until full performance of the judgment, a court having directed the deposit in court of a stock certificate valued at $70,000, and upon appeal from such order, having fixed the supersedeas bond in double the value of the property, may attach the person of the defendant for contempt upon failure to deposit the stock or give the bond; and upon appeal from an order of commitment for contempt, may fix the supersedeas bond in the sum of $70,000; since such bond is more than a mere supersedeas of punishment for contempt but is in aid of execution, and has the same effect as the first supersedeas.

Certiorari to review an order of the superior court for King county, Everett Smith, J., entered November 18, 1912, fixing the amount of a supersedeas bond. Affirmed.

O. C. McGilvra and *F. M. Farmer*, for relator.

M. H. Van Nuys, for respondent.

Morris, J.—Relatrix has sued out a writ of certiorari, to review the order of the court below in fixing the amount of a supersedeas bond, on appeal from an order adjudging relatrix to be in contempt of court, for disobedience of an order commanding her to deposit a certain certificate of stock with the clerk of the lower court, and ordering her commitment until the order of delivery is complied with

The pertinent facts are these: In an action to determine the title and right of possession of 200,000 shares of stock of the Lost River Tin Mining Company, the lower court determined the title and right of possession as against the relatrix, and as a part of its judgment ordered relatrix to forthwith surrender the certificate representing the stock and

[1]Reported in 128 Pac. 1077.

deposit it with the clerk of the superior court. From this judgment, relatrix appealed, and the court upon her motion fixed the amount of a supersedeas bond in the sum of $140,000, having held the value of the stock to be $70,000. The judgment not being complied with, the court issued a show-cause order at the request of the successful party, requiring relatrix to appear and show cause why she should not be punished as for a contempt for her failure to comply with the order, directing the deposit of the certificate. Such proceedings were had upon the return of this order that the court issued its warrant to the sheriff of King county, commanding him to attach the person of relatrix, and detain her in the county jail, until she complied with the order directing the deposit of the certificate, or executed her supersedeas bond on her original appeal. From this order relatrix took an appeal, and upon her request to fix the amount of a supersedeas bond, an order was entered fixing such amount at $70,000, which is the order we are called upon to review. Relatrix here contends that this order is prohibitive and grossly excessive, and all that the court was required to do was to fix such an amount as would insure relatrix submission to the order of attachment in the contempt proceedings, should the same be affirmed by this court. If the supersedeas bond was in the nature of bail, as relatrix contends, her contention would have to be sustained, as it would require no argument to convince us that a $70,000 bond simply to insure her submission to attachment in the contempt proceedings would be grossly prohibitive. That it is more than such an order, and is in effect a supersedeas bond upon the appeal from the original judgment, appears to us upon examination of the proceedings. Upon this writ, the power of the court to enter such an order is not questioned; it hardly could be in view of our statutes conferring such authority. Section 1049, Rem. & Bal. Code, provides, among other acts defined as contempts, the following: "(5) disobedience of any lawful judgment, decree, order, or process of the court." Section 52 (4) gives the court

power "to compel obedience to its judgments." Section 53, for the effectual exercise of the powers specified in the last section, authorizes punishment for contempt. Section 57 confers upon every judicial officer power to compel obedience to its lawful orders. Section 58 confers power to punish for contempt in the exercise of judicial powers. Section 746, provides that, whenever a court shall have ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court may punish disobedience as contempt. Section 512, provides that, when a judgment requires the delivery of property, the same may be enforced by execution, and the court may punish for contempt any person who refuses to obey the same. Section 513 (3) provides that this execution may be against the person of the judgment debtor, and that it shall require his commitment to jail, and (4) when it is to enforce obedience to any special order, it shall command what is required to be done. Section 516 provides that, if the action be one in which the defendant may be arrested, an execution against the person may issue. Section 1059 provides for imprisonment, until the order shall be performed when the contempt consists in the omission or refusal to perform.

These powers confer ample authority upon the court to enforce its judgment in such a case as the one before us by execution against the person, and to order commitment, until the defendant shall have fully performed that which the order of the court has directed to be done. Nothing else has been done in this case. When, therefore, relatrix appealed from the order of commitment she did something more than merely delay her submission to arrest in case of an affirmance here; she in effect superseded the judgment, by tying the hands of the lower court and effectually preventing it from enforcing its judgment by execution. Relatrix failed to give the supersedeas bond on the appeal from the original judgment. That bond was fixed, as is customary, at double the value of the property involved, or $140,000. The supersé-

deas from the contempt judgment has the same effect as the original supersedeas, so that, by her refusal to give the first supersedeas bond, and subjecting herself to commitment for refusal to obey the order of the court, she has reduced the supersedeas bond from $140,000 to $70,000, and if she is successful upon this application, she would still further reduce it to whatever sum we should fix as the proper amount. Suppose, as relatrix here contends, we would fix her supersedeas bond on her appeal in the contempt proceedings in a sum not to exceed $1,500, the effect would be that she retains possession of the disputed stock until the final judgment in this court upon her original appeal, by giving a bond in the sum of $1,500. In other words, she has superseded a $70,000 judgment with a $1,500 bond. Relatrix, if so disposed, could well afford, in order to retain the stock valued at $70,000, and remove it effectually from the jurisdiction of the court, to forfeit a bond in the sum of $1,500. The court ought not to tempt her to do such a discreditable act by making it possible. The act of the lower court here questioned is an act in aid of execution, and not a mere punishment for contempt for which a small fine or a few months' imprisonment would suffice. If it were the latter, we would agree with relatrix that the amount of her supersedeas bond was so grossly prohibitive as to make it an absurdity. It is, however, not such a bond as she contends, nor is the amount in which it shall be fixed to be determined by anything other than its true relation, and that is, a supersedeas bond upon the original judgment. It unquestionably has such an effect and serves such a purpose, and if the relatrix could escape the giving of a bond fixed at $140,000 by giving one in the sum of $1,500 or less, she would be in a position to destroy the value of any ultimate judgment against her, which, needless to say, is not the purpose of supersedeas bonds.

The order is affirmed.

Mount, C. J., Parker, Crow, Ellis, Gose, and Main, JJ., concur.

[No. 10491. Department One. January 4, 1913.]

FRANK M. WATSON, *Appellant*, v. EDWARD M. BAYLISS *et al.*, *Respondents*.[1]

CONTRACTS—ESSENTIALS—MEETING OF MINDS—CONTRACT TO FORM CORPORATION—EVIDENCE—SUFFICIENCY. Recovery cannot be had for breach of a contract to form a corporation, where none of the vital essentials for the organization of the corporation, enumerated by statute, had been agreed upon by the parties, as there was no meeting of minds upon all the essentials of the contemplated contract; and especially where there was no evidence of breach of the contract other than the fact that they did not incorporate.

Appeal from a judgment of the superior court for King county, Gay, J., entered January 19, 1912, dismissing an action on contract, after a trial to the court. Affirmed.

Holzheimer & Herald, for appellant.

Tucker & Hyland and *McClure & McClure*, for respondents.

GOSE, J.—This is an action for damages for an alleged breach of a parol contract. The plaintiff has appealed from an adverse judgment. It is alleged:

"That on or about the 24th day of May, A. D., 1909, in the city of Seattle, state of Washington, the defendant, Edward M. Bayliss, with the design of deceiving, cheating and defrauding the plaintiff and of appropriating to his own use and to the use of said community certain money of the plaintiff, hereinafter mentioned, deceitfully and fraudulently, by inducements and promises hereinafter mentioned, persuaded and induced the plaintiff to purchase a certain show or exhibition known as 'The Land of the Midnight Sun,' consisting of its scenery, fittings, appliances, machinery and other personal property of said show, which was then located in the city of Portland, state of Oregon; and the said defendant, then and there, as a part of said design, deceitfully and fraudulently, undertook and agreed with the plaintiff to act as the special agent of the plaintiff, to go from the city of Seattle to

[1]Reported in 128 Pac. 1061.

the city of Portland, and there, as plaintiff's special agent, purchase for the plaintiff said show or exhibition for the lowest price for which the owner thereof would sell the same; and the said defendant, then and there, as a part of said design, further deceitfully and fraudulently agreed with the plaintiff that he, the said defendant, would immediately upon the purchase of said show join with and assist the plaintiff in the creation and organization of a private corporation for the purpose of taking over said show and of producing and exhibiting the same at a certain place known as 'Pay Streak,' in the Alaska-Yukon-Pacific Exposition, held in the city of Seattle; and said defendant, then and there, as a part of said design, deceitfully and fraudulently, further promised and agreed with the plaintiff to subscribe for and purchase certain shares of the capital stock of said corporation, of the actual value of two thousand ($2,000) dollars. And the said defendant, then and there, as a part of said design, deceitfully and fraudulently, further agreed with the plaintiff to give him, or said corporation, the advantage of his special knowledge and skill in connection with the organization, construction, installation, operation and starting of said show or exhibition, and to instruct the plaintiff in such matters; that said defendant was the inventor of said show or exhibition and had sole and exclusive knowledge of its construction and the method of its installation and operation; and the said defendant well knew that the plaintiff could not construct, install or operate said show without his co-operation and assistance; that each and all of said agreements were deceitfully and fraudulently made for the purpose of inducing the plaintiff to purchase said show or exhibition and to advance and expend, and the plaintiff did, in reliance upon and in consideration of said premises, advance and expend large sums of money, hereinafter mentioned, for exhibition concessions, construction of a building for said show on said 'Pay Streak' and expenses in construction, installation and operation thereof."

It is further alleged that the appellant, in pursuance of the contract, immediately upon the purchase of the show expended a large sum of money preparatory to opening and presenting the exhibition; that the respondent at all times

failed and refused to join with and assist the appellant in the organization of a corporation, or to subscribe for or purchase any shares of the capital stock of such a corporation, or to give the appellant or the corporation any assistance whatever toward the accomplishment of the end in view; that, by reason of the respondent's acts, the appellant was unable to organize any corporation or to finance the show; and that it was agreed that, in the organization of the corporation, the appellant was to have "at least fifty per centum of the capital stock of said corporation;" and that, by reason of the acts and omissions of the respondent, the appellant lost his share of the reasonable profits to be derived from the show, which it is alleged would have been $5,000.

Our statute, Rem. & Bal. Code, § 3679, provides that any two or more persons, who may desire to form a company for one or more of the purposes specified in § 3677, shall make and subscribe written articles of incorporation; that these articles shall state (1) the corporate name; (2) the objects for which it is formed; (3) the amount of its capital stock and the number of shares of which it shall consist; (4) the time of its existence; (5) the number of trustees and their names; and (6) the name of the locality in which the principal place of business of the company is to be located. There is no allegation that any of these matters were agreed upon, other than the object of the corporation. It is elementary that, without a meeting of minds upon all the essentials of a contemplated contract, there is no binding agreement. Our statute treats all the matters enumerated above as essential to the organization of a corporation. Whether one or two of these elements might be omitted we need not inquire. It is obvious, however, that the amount of capital stock, the number of shares of which it shall consist, and the number of trustees and their names, are among the vital essentials of a corporation. It is through its trustees that a corporation is managed, and its capital stock is the very basis of its being.

"If any portion of the proposed terms [of the contract]

are not settled or a mode agreed upon by which they may be settled, there is no agreement." 9 Cyc. 245.

See, also, 30 Cyc. 357; *McDonnell v. Coeur D'Alene Lum. Co.*, 59 Wash. 698, 110 Pac. 13; *Pasco Reclamation Co. v. Cox*, 70 Wash. 549, 127 Pac. 107; *Loewenberg v. De Voigne*, 145 Mo. App. 710, 123 S. W. 99.

In the *Loewenberg* case, in considering a similar question, the court said:

"How would the court ascertain the essentials which must be in articles of association, from a contract that neither specifies the amount of capital or the number of shares into which it should be divided, nor the amount proposed to be paid in on incorporation? Who shall constitute the first board of directors? Even the division of the shares among the incorporators or subscribers is unnamed. These are all among particulars which our statute requires shall be set out in the articles."

We attach no consequence to the fact that the appellant characterizes the breach as having been born of an intent to cheat and defraud. Brushing aside the characterization of the respondent's conduct, there is an attempt to allege a contract to form a corporation, and the breach of the contract by the respondent to the appellant's damage.

The evidence as to the contract and its breach is no less indefinite. The only evidence bearing upon the refusal of the respondent to participate in the organization of a corporation is the following: "Q. Did Mr. Bayliss ever incorporate with you? A. No, sir." This is far from proving a breach of the alleged agreement. Appellant's witness Murray said that there was no agreement as to who should be trustees. The appellant testified that Murray was "to put in $3,000." For aught that appears in the evidence, the tentative arrangement to incorporate may have failed of consummation from the refusal of Murray to unite, or from the inability of the parties to agree on the essentials of the enterprise.

The judgment is affirmed.

MOUNT, C. J., CHADWICK, CROW, and PARKER, JJ., concur.

[No. 10920. *En Banc.* January 4, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Andrew J. Quigley, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY *et al., Respondents.*[1]

CERTIORARI—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL—ELECTION CONTEST. The delay incident to an appeal in an election contest does not authorize a review by certiorari, or render the remedy by appeal inadequate, by reason of the fact that the term of office begins, and the period of six months for preserving the ballots expires before the appeal can be heard; since the ballots can be preserved as other documentary evidence offered and rejected at the trial; and especially in view of the statute providing for appeals in election contests (MOUNT, C. J., and FULLERTON, J., dissenting).

Application for a writ of certiorari to review a judgment of the superior court for King county, Albertson, J., entered December 12, 1912, denying an application to order a recount in an election contest. Application denied.

Geo. H. Rummens, for relator, contended, *inter alia*, that the writ of review is the proper remedy. *State ex rel. Meredith v. Tallman*, 24 Wash. 426, 64 Pac. 759; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *State ex rel. Royse v. Superior Court*, 46 Wash. 616, 91 Pac. 4, 123 Am. St. 948, 12 L. R. A. (N. S.) 1010; *Hill v. Superior Court*, 15 Cal. App. 307, 114 Pac. 805. An election contest, given to any elector who desires to contest an election, is in the interest of the public and should not be approached captiously, suspiciously, or capriciously by the courts. *Searcy v. Grow*, 15 Cal. 117; *Norwood v. Kenfield*, 30 Cal. 393; *Keller v. Chapman*, 34 Cal. 635; *Minor v. Kidder*, 43 Cal. 229; *Sweeny v. Adams*, 141 Cal. 558, 75 Pac. 182. The ballots are the primary and best evidence of the number of votes received by any candidate. 15 Cyc. 425; *People ex rel. Budd v. Holden*, 28 Cal. 124; *Coglan v. Beard*, 65 Cal. 58, 2 Pac. 737; *Id.*, 67 Cal. 303, 7 Pac. 738; *Tebbe v. Smith*, 108 Cal.

[1]Reported in 129 Pac. 83.

101, 41 Pac. 454, 49 Am. St. 68, 29 L. R. A. 673; *People ex rel. Keehler v. Robertson*, 27 Mich. 116; *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257; *Lucas v. Avis*, 28 Ky. Law 184, 89 S. W. 1; *Kingery v. Berry*, 94 Ill. 515; *Leonard v. Woolford*, 91 Md. 626, 46 Atl. 1025; *Garms v. People*, 108 Ill. App. 631; *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018; *Caldwell v. McElvain*, 184 Ill. 552, 56 N. E. 1012. Malconduct does not necessarily mean fraudulent conduct; making mistakes in counting is malconduct. *Hadley v. Gutridge*, 58 Ind. 302; *Coglan v. Beard* and *Sweeny v. Adams*, *supra*. When the integrity of the ballots has been established, they should be received without any other evidence. *People v. Holden*, *Coglan v. Beard*, *Tebbe v. Smith*, *Kingery v. Berry*, *Edwards v. Logan*, and *Leonard v. Woolford*, *supra*; *Langley v. Head*, 142 Cal. 368, 75 Pac. 1088; *Abbott v. Hartley*, 143 Cal. 484, 77 Pac. 410; *Clanton v. Ryan*, 14 Colo. 419, 24 Pac. 258; *Catron v. Craw*, 164 Ill. 20, 46 N. E. 3; *Reynolds v. State ex rel. Titus*, 61 Ind. 392; *Hudson v. Solomon*, 19 Kan. 177; *Gantt v. Brown*, 238 Mo. 560, 142 S. W. 422; *People v. McClellan*, 191 N. Y. 341, 84 N. E. 68.

W. H. White, *Kitt Gould*, and *Edgar C. Snyder*, for respondents.

ELLIS, J.—On December 13, 1912, the relator procured, upon *ex parte* application, a writ of certiorari, to review the proceedings of the superior court of King county in an action to contest an election. On the return day fixed by the writ, the respondent, Byron Phelps, moved to quash the writ on the ground of lack of jurisdiction. Briefly, the ruling sought to be reviewed is the action of the trial court in refusing to order a recount of the ballots until some proof *aliunde* the ballot boxes should be made tending to impeach the regularity or integrity of the official count and canvass.

It is contended that certiorari will not lie, because the statute governing election contests accords an adequate remedy by appeal. Rem. & Bal. Code, § 4956. The relator argues that the remedy by appeal would not be adequate, for the reason that the contestee would take office on January 13, 1913, and would hold the office a number of months before an appeal could be heard, and that the six months during which the ballots will be preserved under the statute (Rem. & Bal. Code, § 4928), would expire and the ballots would be destroyed before a retrial could be had. This argument is not convincing. The same result would follow in every case of election contest if it would follow in this case, and the section of the statute giving the appeal would be nugatory. But no such result need follow in any case. Documentary and physical evidence when properly offered may, although rejected, be preserved and made exhibits in the case. The same facilities exist for the preservation in the statement of facts of evidence offered and rejected as of that received. The remedy by appeal would be as adequate in this as in any other election contest. The delay would be no greater than in an appeal in a case of any other character, and we have repeatedly held that the delay incident to an appeal cannot be regarded as affecting the adequacy of the remedy. *Jones v. Paul*, 56 Wash. 355, 105 Pac. 625; *State ex rel. Young v. Denney*, 34 Wash. 56, 74 Pac. 1021; *State ex rel. Nelson v. Superior Court*, 31 Wash. 32, 71 Pac. 601; *State ex rel. Northern Pac. R. Co. v. Superior Court*, 46 Wash. 303, 89 Pac. 879; *State ex rel. Carrau v. Superior Court*, 30 Wash. 700, 71 Pac. 648. Where the remedy by appeal is adequate, certiorari or other extraordinary remedy will not lie. *State ex rel. Coplen v. Superior Court*, 66 Wash. 225, 119 Pac. 383; *State ex rel. Vincent v. Benson*, 21 Wash. 571, 58 Pac. 1066; *State ex rel. Washington Dredging & Imp. Co. v. Moore*, 21 Wash. 629, 59 Pac. 505; *State ex rel. Hibbard & Co. v. Superior Court*, 21 Wash. 631, 59 Pac. 505; *State ex rel. Townsend Gas & El. L. Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933.

The legislature, in enacting § 4956, providing the remedy by appeal in election contests in the very same statute allowing a contest, must be presumed to have considered that remedy adequate in such cases. To hold that it is inadequate in this case is to hold that it is inadequate in any such case. It is, in effect, to repeal the statute, and declare a policy contrary to that expressly declared by the legislature upon a subject clearly within its province.

The decisions of this court cited by the relator are not pertinent to the case here. *State ex rel. Meredith v. Tallman*, 24 Wash. 426, 64 Pac. 759; *State ex rel. Royse v. Superior Court*, 46 Wash. 616, 91 Pac. 4, 123 Am. St. 948, 12 L. R. A. (N. S.) 1010. In each of these cases the remedy by appeal was held inadequate because, and only because, the term of office would expire before the hearing on appeal could be had. No such condition is found in the case before us. The other case cited, *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385, rests upon the same ground, namely, that the remedy by appeal was inadequate to preserve the fruits of the litigation if won.

The proceedings in contest here presented are not in *quo warranto*, either as at common law or as given by our analogous statutory action. The right to a contest such as here sought to be reviewed rests solely upon, and is governed by, the provisions of the particular statute providing therefor. Rem. & Bal. Code, §§ 4941 to 4957, inclusive. The section giving the remedy by appeal has never been repealed, either expressly or by implication. To entertain this writ, in the absence of anything distinguishing the proceedings from other election contests brought under the statute, would be a gratuitous assumption of the legislative function.

The motion to quash is granted, and the application is denied.

PARKER, CROW, MAIN, MORRIS, CHADWICK, and GOSE, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to concur, either in the opinion announced by Judge Ellis, or in the judgment which the majority of the court think proper to render in this case. The statute thought to require judgments entered in election contests to be brought to this court by appeal only was first enacted by the territorial legislature in 1866. It was reenacted in the form of a code by the territorial legislature of 1881, and published in the code of that year known as the Code of 1881. Since that time it has been carried forward by the codifiers of the laws of Washington into the several codes, without change of verbiage except to substitute the term "Superior Court" for the term "District Court," wherever such term appeared in the act. The statutes relating to appeals were changed and modified a number of times by the territorial legislature between the years 1866 and the change from the territorial form of government into statehood; and twice since that time. The changes made in the statutes during this period in this respect were radical. Indeed, there is scarcely any resemblance between the present statute relating to appeals and the statutes relating thereto of 1866 or 1881. It has seemed to me, therefore, that, if the term "appeal" as used in the statute of 1866 or Code of 1881, ever had any technical significance, it has lost it by the subsequent repeal of the statutes to which it did relate and the enactments of new and different statutes called statutes of appeal. In other words, inasmuch as the right and method of contesting an election was statutory, rendering it necessary to provide for a review in the higher court from the judgment of the court of original jurisdiction, if such review was to be had, the legislature used the term "appeal" in the sense of "review," and not in the sense of making a distinction between two forms or methods of review that might thereafter be provided. This being the true meaning of the statute, the court should give it effect by allowing reviews in this court for election contests by a writ of review whenever the remedy by appeal is not plain, speedy or adequate. That

the remedy by appeal in this instance does not afford a plain, speedy or adequate remedy seems to me to be incontrovertible. The delays incident to the fact that this court can hear appeals only at regular sessions, and the delays incident to the procedure itself, even if pursued with the utmost diligence, will hardly render it possible to have a final determination of this case before the term of the officer whose right is sought to be contested expires. Other reasons might be given, but this fact alone, to my mind, shows that the remedy by appeal is inadequate.

The case should therefore be determined upon its merits.

MOUNT, C. J., concurs with FULLERTON, J.

[No. 10629. Department One. January 6, 1913.]

MANSON F. BACKUS, *Respondent*, v. A. S. FEEKS *et al.*, *Appellants*.[1]

GUARANTY—CONSIDERATION—GUARANTEEING A VOIDABLE LEASE. Since an unacknowledged lease for a term exceeding one year, where the tenant takes possession, is good as a lease from month to month until terminated by the statutory notice, it constitutes a sufficient consideration for the obligation of sureties in a bond given by the tenant conditioned that he perform all the covenants, agreements and obligations contained in the lease and save the lessor harmless from all loss by reason of its execution; and the bond guarantees the performance of the terms of the lease as written, since it was not an immoral or illegal contract or against public policy.

GUARANTY—LIABILITY OF SURETY. Sureties in a bond, guaranteeing the performance of a contract which is not illegal or immoral, are bound by their guaranty although the contract cannot be enforced against the principal.

FRAUDS, STATUTE OF. The statute of frauds being personal to the debtor, cannot be taken advantage of by sureties who guaranteed the performance of a lease which was voidable under the statute of frauds.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 2, 1912, upon findings in

[1]Reported in 129 Pac. 86.

favor of the plaintiff, in an action upon a bond, after a trial to the court. Affirmed.

Murphy & Wall, for appellants.

Higgins & Hughes (*Hyman Zettler*, of counsel), for respondent.

Gose, J.—On the 25th day of September, 1909, the plaintiff, his wife uniting, executed to H. N. Winters and Mamie Winters, his wife, an unacknowledged lease upon the Manhattan Building, in the city of Seattle, to run for a period of five years from the first day of October following. The lessees covenanted and agreed to pay as rental therefor, $1,050 on the first days of October, November, and December, 1909; $1,500 on the first day of January, 1910, and on the first day of each month thereafter to and including the first day of September, 1910; $1,600 on the first day of October, 1910, and the same amount on the first day of each month thereafter to and including the first day of September, 1911; $1,700 on the first day of October, 1911, and a like amount on the first day of each month thereafter to and including the first day of September, 1914. On the 29th day of September, 1909, the lessees, as principals, and A. S. Feeks and William H. Ruttle, as sureties, gave to the plaintiff their joint and several bond, which recites the execution of the lease; that the lease contains certain "covenants, agreements and obligations to be kept and performed" by the lessees; and provides:

"Now therefore, if the said H. N. Winters and Mamie Winters, his wife, their heirs, executors, or administrators, shall at all times and in every particular keep and perform in every way all the covenants, agreements and obligations in said lease contained, and at the expiration or earlier determination of said lease return the property therein demised to the said M. F. Backus and wife in a condition provided in said lease and at all times hereafter indemnify and save harmless the said Backus and wife against all loss, dam-

age or costs arising by reason of the execution of said lease, then this obligation shall be void."

The lease and bond were delivered simultaneously on September 29, and the lessee took possession of the leased premises on October 1, and remained in possession until April 6 following when he abandoned the premises without notice to the landlord. On the 15th day of April, the receiver appointed by the state court took possession of the premises, and on the 26th day of April, delivered possession to the trustee in bankruptcy appointed by the Federal court. On the 6th day of May, the referee in bankruptcy directed the receiver to surrender the premises to the plaintiff and to disclaim and abandon the lease, and on that day the plaintiff resumed possession of the premises. The rent for the months of March, April and May, amounting to $4,500, was then due under the terms of the lease, and had not been paid. Thereafter, and on the 3d day of June, the plaintiff leased the premises to a third party for a term of five years upon a rental that will result in a loss to him of an amount largely in excess of the penalty of the bond. The court found that the rental reserved in the last-named lease was the full market rental value of the premises at that time, and that the lease was expeditiously made. This action was thereafter instituted by the plaintiff to recover from the sureties the amount named in their bond, to wit, $5,000. A judgment was entered against them for that amount, and the defendant Ruttle has appealed.

He contends that the lease, being unacknowledged and for a term exceeding one year, is void under our statute, and hence that there is no cause of action on the bond. While the lease was not enforceable other than as a tenancy from month to month, it was not void, but valid and binding, until terminated by the statutory notice. In *Northcraft v. Blumauer*, 53 Wash. 243, 101 Pac. 871, 132 Am. St. 1071, we said that a parol lease of real property for a period longer than one year, where the lessee had taken possession with the

consent of the lessor, "is only voidable." In *Koschnitzky v. Hammond Lum. Co.*, 57 Wash. 320, 106 Pac. 900, in considering the effect of an unacknowledged lease of real property for a term exceeding one year, we said: "So that it will be seen that the statute does not make the lease void *in toto;*" but that, in the absence of such equities as would work an estoppel, it would create a tenancy from month to month or from period to period on which rent was payable, terminable by giving proper notice. In *Anderson v. Frye & Bruhn*, 69 Wash. 89, 124 Pac. 499, we held, that an unacknowledged lease of real property for the term of one year "with the privilege of two years' renewal," at a stipulated monthly rental, created a paper tenancy for a period exceeding one year, that it was not enforceable as a lease for one year only, but that it was a lease from month to month, and terminable by either party upon his giving the notice provided by the statute, Rem. & Bal. Code, § 8803. The language of the opinion is that the lease was "void and unenforceable" as a lease for one year, in that it created a privilege of renewal for a period beyond one year, and that "the tenancy under which appellant was in possession of the property prior to October 1, 1910, was terminated on that day by notice and vacation."

In *Snyder v. Harding*, 38 Wash. 666, 80 Pac. 789, it was held that one in the possession of real property under a defective lease, but with the implied consent of the owner, was not a wrongdoer, but a tenant from period to period upon which the rent was payable, and that the rental reserved in the lease was the measure and the limit of the tenant's liability. The rule of construction underlying these cases is that, where there has been an attempt to let real property for a period exceeding a year by means of an unacknowledged written lease, and the lessee has gone into possession with the express or implied consent of the owner, a tenancy from month to month or from period to period upon which rent is payable is created, and that the tenancy is terminable by

the statutory notice given by either party to the other. It is apparent from a reading of these cases that the word "void" is used as the legal equivalent for unenforceable, and all that we have held is that, where the lease is for more than a year and unacknowledged, if the tenant has gone into possession, he becomes a tenant from month to month or from period to period upon which rent is payable, and that his tenancy is terminable under the provisions of Rem. & Bal. Code, § 8803.

The sureties, by the terms of the bond, guaranteed (1) that the lessees should perform the "covenants, agreements and obligations" contained in the lease, and (2) that they would "indemnify and save harmless the said Backus and wife against all loss, damage, or costs arising by reason of the execution of said lease." The essential inquiry here is, as indeed it is in all cases, what was the intention of the parties? Obviously their intention was that the lessees should keep their covenants as they were written—that is, that they should pay the rent for the full leasehold period. It was not contemplated that they might hold possession under the lease for a month or more, and then give the statutory notice of their intention to vacate the premises and thus discharge the sureties from any liability on the bond other than the payment of the rent then accrued. While the lease is not enforceable except as a lease from month to month, it was not an immoral contract, or an illegal one in the sense that it violated any rule of public policy, and hence the parties were at liberty to mutually keep their covenants.

In treating of the exceptions to the rule that the extent of the liability of the principal debtor measures and limits the liability of the surety, in 20 Cyc. 1421, the following view is announced:

"Important exceptions to the above rule exist which must not be overlooked. They are found in those cases where the defect is not in the contract itself but pertains to those matters which are personal to the principal debtor or they arise from causes which originate in the law. A guaranty of an existing contract may stand by itself, although the obligation

guaranteed is invalid and it will usually be found that where the fact that the supposed principal debtor is not bound is held to be a defense on behalf of the guarantor, such fact has also resulted in a failure of consideration for the contract of guaranty or that such contract has been brought about by fraud or has been entered into under a mutual mistake. And as the guarantor may by the terms of his contract make himself liable for the principal debt, although it be invalid, the question of whether the liability of a guarantor is to be measured by the liability of the principal debtor is largely a matter of interpretation of the contract of guaranty."

This principle finds support in the following cases: *McLaughlin v. McGovern*, 34 Barb. 208; *Yorkshire Railway Wagon Co. v. Maclure*, 19 Ch. Div. L. R. 478, 489; *Robbins v. Robinson*, 176 Pa. St. 341, 35 Atl. 337; *Mason v. Nichols*, 22 Wis. 360; *Kiessig v. Allspaugh*, 99 Cal. 452, 34 Pac. 106; *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576; *Slocum v. Taylor*, 8 Serg. & Rawle 398; *Kyger v. Sipe*, 89 Va. 507, 16 S. E. 627; *Davis v. Statts*, 43 Ind. 103, 13 Am. Rep. 382; *Mitchell v. Hydraulic Bldg. Stone Co.* (Tex Civ. App.), 129 S. W. 148.

In *McLaughlin v. McGovern*, the lessees entered into and remained in possession of the leased premises, but only one of them signed the lease. The defendant guaranteed "the fulfillment [by the lessees] for the part of this agreement to be performed by them," and was held liable on the guaranty. The court said:

"What is the obligation assumed by the defendant in this case? It is not that Reynolds and Tague shall execute the lease, but that they shall fulfill the engagements contained in the instrument upon which his guaranty was indorsed."

In the *Maclure* case, it was held that the lender may recover against the sureties although the loan was made to a railway company which could not borrow. The same principle was announced in *Robbins v. Robinson*, and in *Mason v. Nichols*. In *Kiessig v. Allspaugh*, the sureties upon a con-

tractor's bond were held liable, notwithstanding the fact that the contract itself was "wholly void" because not filed with the recorder as required by statute. The court said that, although the contract could not be enforced because not recorded, "the contractor might nevertheless perform, and the plaintiff could accept such performance, and neither be guilty of any wrong in so doing." A like principle was announced in *People's Lumber Co. v. Gillard*, *supra*. In *Slocum v. Taylor*, it was held that a surety on a bond conditioned for the performance of an award of arbitrators was liable, although the award was given in an action instituted before a justice of the peace for an amount exceeding his jurisdiction, and his judgment had been reversed. In *Kyger v. Sipe*, it was held that the surety was liable upon his bond where the principal, an infant, had disaffirmed and was therefore discharged. In *Davis v. Statts*, a like rule was applied to the sureties upon the note of a married woman who was discharged upon her plea of coverture. In *Mitchell v. Hydraulic Bldg. Stone Co.*, it was held that the sureties upon a bond, given by a private corporation as security for the fulfillment of a building contract void as to it because in excess of its powers as defined by its charter, were liable.

There is another reason for affirming the judgment. Our statute in reference to the execution and construction of leases is a statute of frauds only. In *First Presbyterian Church v. Swanson*, 100 Ill. App. 39, it was held that the defense of the statute of frauds was a privilege personal to the principal, and that the sureties upon a contractor's bond may not invoke the statute on account of the failure of their principal to sign the contract secured by the bond. 20 Cyc. 306, states that this is almost the universal rule.

The appellant relies upon the rule stated in 1 Brandt on Suretyship Guaranty (3d ed.), § 163:

"A surety is not entitled to every exception which the principal debtor may urge. He has a right to oppose all which

are *inherent* to the debt not those which are personal to the debtor;"

insisting that the obligation of the sureties in the case at bar is "inherent to the debt." We are not able to agree with this contention.

The judgment is affirmed.

Mount, C. J., Parker, Crow, and Chadwick, JJ., concur.

[No. 10669. Department Two. January 7, 1913.]

M. A. Sherman, *Respondent*, v. E. Pittwood, *Appellant*.[1]

Appeal—Review—Findings. Findings in favor of the plaintiff upon conflicting evidence will not be disturbed on appeal, when supported by evidence, and there was not such preponderance in defendant's favor as to entitle him to a dismissal.

Appeal from a judgment of the superior court for Spokane county, Black, J., entered October 31, 1911, upon findings in favor of the plaintiff, in an action in tort, after a trial to the court. Affirmed.

Morrill, Chester & Skuse, for appellant.

Voorhees & Canfield and *John Pattison*, for respondent.

Morris, J.—Appellant is a dentist, and while he was doing some work upon respondent's teeth, a small emery disc that he was using in shaping and grinding the teeth broke, and cut into and injured respondent's tongue. Answering respondent's claim of negligence in not taking proper precautions to prevent the injury complained of, appellant contended that he was using due care; that the disc was of standard make, and was being used in the manner employed by skilled dentists when respondent suddenly jerked his head, and his tongue coming in contact with the disc, broke it, and thus caused the injury complained of.

[1]Reported in 128 Pac. 1048.

These contentions presented a simple question of fact to the court, who tried the case without a jury, and we can find no reason why the findings should be disturbed. There can be no question but that respondent's evidence, if accepted by the court, was sufficient to sustain the findings, and they will be sustained, as we cannot say there was such a preponderance in appellant's favor as to entitle him to a dismissal.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, ELLIS, and MAIN, JJ., concur.

[No. 10420. Department Two. January 7, 1913.]

T. J. REILEY, *Respondent*, v. SPOKANE SANITARY LAUNDRY COMPANY *et al.*, *Appellants*.[1]

CONTRACTS—CONSIDERATION—PROMISE TO PAY DEBT OF ANOTHER. One purchasing property of a receiver under an agreement to pay all costs of the receivership, is liable for a feed bill incurred by the receiver, on the theory that, on a promise to pay to another the latter's debt to a third person, the third person may maintain an action thereon.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 11, 1911, upon findings in favor of the plaintiff, in an action on contract, after a trial to the court. Affirmed.

Berkey & Cowan and *W. W. Zent*, for appellants.

Danson, Williams & Danson (*George D. Lantz*, of counsel), for respondent.

MORRIS, J—This action was brought to recover for the hire and feed of certain horses, contracted for partly by the appellant company and partly by its receiver. The liability of appellant Hose is based upon his written agreement with the receiver, in putting in a bid under which he purchased the property from the receiver, to pay all costs of the receivership

[1]Reported in 128 Pac. 1075.

proceedings. The court below held that, under this agreement, Hose was liable for the respondent's bill, and we think it was right in so holding. The liability of Hose is one of fact, and is to be determined from all the evidence in the case. We have no doubt that, in making his agreement to purchase from the receiver, he fully intended, and the receiver understood he was, to pay such a sum as would relieve the receiver from all costs and expense he had become obligated for in carrying on the laundry business.

Appellants' contention is that this case falls within that rule of law refusing to recognize a right of action in one who is a stranger to a contract, because of some indirect or incidental benefit which might accrue because of the performance of the contract. This rule may be conceded, but in our opinion it has no application here. It is clear to us from all the facts that Mr. Hose considered he was bound to pay the respondent's bill, that he had this in mind in using the language he did, and that he brings himself within another well-recognized rule of law, that where one person makes a promise to another to pay the latter's debt to a third, the third person may maintain an action on the promise in his own name. The whole matter is so largely one of evidence that we will not discuss the matter farther, believing, as we do, that the liability enforced should be sustained.

The judgment is affirmed.

Mount, C. J., Fullerton, Ellis, and Main, JJ., concur.

[No. 10502. Department Two. January 7, 1913.]

DORA E. ATWOOD *et al.*, *Respondents*, v. WASHINGTON WATER POWER COMPANY, *Appellant*.[1]

CARRIERS—TAKING ON PASSENGERS—SUDDEN JERKS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for negligently starting a street car with a sudden jerk, alleged to have caused a miscarriage, it is error to instruct that there was no evidence of contributory negligence on the part of the plaintiff, where she testified that she lifted a child onto the car, and a physician testified that the miscarriage might have been caused by lifting the child.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. It is error to assume in an instruction in an action for personal injuries that the defense of contributory negligence must be established by the evidence introduced by the defendant.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 5, 1912, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger on a street car. Reversed.

Post, Avery & Higgins, for appellant.

Munter & Flood, for respondents.

MORRIS, J—The respondents, alleging injury to Mrs. Atwood through negligence of appellant, while a passenger upon one of its cars, recovered judgment below, from which appeal is taken. Many errors are assigned, but finding one which in our opinion demands a reversal of judgment, we will discuss that alone.

The defense was a denial of negligence on the part of appellant, and a charge of contributory negligence on the part of Mrs. Atwood. The court, among other instructions, charged the jury as follows:

"(19) The defendant having alleged the defense of contributory negligence the burden rests upon the defendant to establish that defense by a preponderance of the evidence,

[1]Reported in 128 Pac. 1065.

and the court instructs the jury that there is no evidence in this case offered or introduced by the defendant to establish such a defense."

We think the giving of this instruction was error for which a new trial must be granted. By it the court practically denied to appellant its defense of contributory negligence, and commented upon a question of fact which it was the province of the jury to determine, as in our judgment there was evidence in the case from which the jury might have found that Mrs. Atwood's injury was due to her own act. At the time of the alleged injury, Mrs. Atwood had been pregnant for about three months, and the negligence complained of was in starting the car with such a sudden and extraordinary jerk, before she was seated, as to throw her violently against the door of the car, producing a miscarriage. When she boarded the car, Mrs. Atwood was accompanied by two children, eight and six years of age. She testified that she lifted the six-year-old child from the ground to the car, and her physician testified that, while the jerk and fall against the car door might produce a miscarriage, the same result might follow from lifting the child upon the car. Here, then, were two causes that might have produced the injury complained of, and between which as a question of fact the jury must determine. One of these causes the jury might attribute to the negligence of appellant without contributing cause on the part of Mrs. Atwood; the other might be attributed to the act of Mrs. Atwood in lifting the child, for which the appellant would not be responsible. One cause was the fault or negligence of appellant; the other the fault or negligence of Mrs. Atwood. When, therefore, the court told the jury there was no evidence introduced by the defendant to establish its defense, it eliminated from the consideration of the jury the facts capable of producing a miscarriage for which the company was not liable. The jury, or some of them, might have believed the producing cause of the miscarriage was lifting the child; yet they are in-

structed by the court to disregard this evidence and belief and confine their attention to the other producing cause.

Again the instruction is bad in assuming that contributory negligence must be established by evidence introduced by defendant. While undoubtedly in our jurisdiction the burden of establishing contributory negligence is on the one who affirmatively pleads it, yet this does not mean such an one must produce the witness by which it may be established. It may be established by the evidence of the plaintiff on either direct or cross-examination. The rule simply means that, whenever or however it appears, it must be established by the preponderance of the evidence, and that since the plaintiff is presumed to be free from negligence, the burden of showing the contrary, either by its own case or that of the plaintiff, rests upon the defendant.

Some of the other instructions complained of contain faulty language in assuming certain facts, but as these faults will probably be corrected in a second trial, we will make no other reference to them. So, too, with the examination as a witness of the son of respondents, eight years old. The admission of such testimony is admitted by appellant to be within the discretion of the court, upon an examination into the child's qualifications, it being contended that such discretion was not exercised, but that the court assumed it had no power to reject the testimony. We think the court based its ruling upon an examination of the child, and thus exercised discretion. But be that as it may, the court upon the second trial will probably satisfy itself that the child is a competent witness before accepting his testimony.

Other alleged errors need not be referred to in view of the conclusion we have reached as to the giving of instruction nineteen. For this error, the judgment is reversed.

Mount, C. J., Fullerton, Ellis, and Main, JJ., concur.

[No. 10512. Department Two. January 7, 1913.]

H. B. McALLISTER, *Respondent*, v. ROBERT L. CHAMBERS, *as Administrator, Appellant*.[1]

EXECUTORS AND ADMINISTRATORS—ACTION AGAINST EXECUTORS—NOTE OF DECEASED—PAYMENT—EVIDENCE — ADMISSIBILITY. In an action upon a note drawing 10 per cent interest, executed by the defendant's decedent in his lifetime, it is error to exclude evidence offered by the defense that the deceased was financially able to pay the note, and was loaning money at from 6 to 8 per cent interest, and prior to his death assembled his children and divided his property among them, one of them being the wife of the plaintiff, and that entries in a book kept by the deceased at the time of the alleged payments of interest indicated that the payments were on the principal; especially where, at the time the note became due, six years' interest was paid in advance and no payment was made thereafter for sixteen years, when ten years' interest was paid, equaling the face of the note.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered April 6, 1912, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action on contract. Reversed.

Gordon, Easterday & Askren and *M. S. Lindsay*, for appellant.

H. W. Lueders, for respondent.

MOUNT, C. J.—The plaintiff brought this action in January, 1912, to recover upon a promissory note executed by Frederick Myers in his lifetime. The note was executed by the deceased on September 15, 1890, for $1,200, and made payable to the plaintiff thirty days after date, with interest at 10 per cent per annum. The complaint alleges that, on November 11, 1890, interest was paid on the note to November 11, 1896; that on August 1, 1906, interest was paid to that date, and on August 1, 1910, interest was paid to August 1, 1911; that no further payments were made on the

[1]Reported in 129 Pac. 85.

note; that after the death of the maker on June 23, 1911, Robert L. Chambers was appointed administrator for Mr. Myers' estate; that a claim was filed for the amount of the note, and rejected by the administrator October 29, 1911. The prayer of the complaint is for $1,200, with interest at 10 per cent per annum since August 1, 1911.

The defendant, for answer, denied the note upon an information and belief, and as affirmative defenses, alleged (1) that if the deceased made the note in his lifetime, it was fully paid by him prior to his death, and (2) that the action is barred by lapse of time. At the trial of the case, the defendant sought to show that the deceased, after the execution of the note and before his death, was financially able to pay the note, and was loaning his own money at rates of interest varying from 6 to 8 per cent per annum, and prior to his death Mr. Myers assembled his children and divided his property among them, one of them being the wife of plaintiff. Defendant also offered entries in a book made by deceased at the time of the payments, for the purpose of showing that the payments made by transfer of property were not made as interest payments, but were paid upon the principal. This evidence was all excluded at the trial, and the jury directed to find a verdict for the plaintiff.

We think all this evidence should have been received. These facts, if true, were circumstances tending to show payment. The maker of the note was dead. The note was more than twenty years old before suit was brought upon it. At about the time it became due, six years' interest was paid in advance upon it and, after the expiration of that period, no payment was made until 1906, sixteen years later, when ten years' interest was paid, equalling the face of the note. It is possible that interest payments were made as stated, but such facts would depend somewhat upon the business character and financial condition of the maker of the note. The circumstances offered reasonably tended to rebut the evidence that the note

was not paid. In *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884, we said:

"In a trial of a case, any circumstance is admissible which reasonably tends to establish the theory of the party offering it, or to explain, qualify, or disprove the testimony of his adversary. When death has stilled the lips of one of the parties to the transaction and demand is being asserted against his estate, his representative should be permitted to combat the claim with any circumstance reasonably tending to shed light upon the transaction in controversy."

We think this is applicable to the case presented here, and that the evidence should have been received and the case submitted to the jury.

The judgment is therefore reversed, and the cause remanded for a new trial.

MORRIS, ELLIS, FULLERTON, and MAIN, JJ., concur.

[No. 10486. Department One. January 7, 1913.]

FLORESTINE PERRAULT, *Respondent*, v. EMPORIUM DEPARTMENT STORE COMPANY, *Appellant*.[1]

CARRIERS—OF PASSENGERS—ELEVATORS—DEGREE OF CARE—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. The question of the negligence of the defendant, in operating a passenger elevator in its store, is for the jury, where it appears that, after taking on plaintiff's companions, the elevator boy waited for the plaintiff at his post, with the elevator door open and the floor of the elevator four or five inches below the level of the floor, causing plaintiff to fall and break her knee on entering the elevator.

SAME—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK BEFORE ENTERING ELEVATOR—EVIDENCE—QUESTION FOR JURY. Whether a customer in a store is guilty of contributory negligence in entering a waiting passenger elevator without looking and observing that the elevator was several inches below the level of the floor, is a question for the jury, where the elevator boy was at his post and the door was open (MOUNT, C. J., and CHADWICK, J., dissenting).

[1]Reported in 128 Pac. 1049.

Appeal by defendant from an order of the superior court for Yakima county, Grady, J., entered December 20, 1911, granting plaintiff a new trial on the ground of inadequate damages, after a verdict of the jury rendered in favor of the plaintiff, in an action for injuries sustained in a passenger elevator in a department store. Affirmed.

Englehart & Rigg, for appellant, contended, among other things, that the plaintiff was guilty of contributory negligence. 5 Thompson, Commentaries on the Law of Negligence, § 6244; *Bundy v. Union Iron Works*, 46 Wash. 231, 89 Pac. 545; *Day v. Cleveland etc. Co.*, 137 Ind. 206, 36 N. E. 854; *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981; *Danuser v. Seller & Co.*, 24 Wash. 565, 64 Pac. 783; *Phillips Co. v. Pruitt*, 26 Ky. Law 831, 82 S. W. 628; *Robb v. Connellsville Borough*, 137 Pa. St. 42, 20 Atl. 564; *Coburn v. Philadelphia, W. & B. R. Co.*, 198 Pa. 486, 48 Atl. 265; *Lafflin v. Buffalo & S. W. R. Co.*, 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433; *Indianapolis Traction & Terminal Co. v. Pressell*, 39 Ind. App. 472, 77 N. E. 357; *Cloney v. Kalamazoo*, 124 Mich. 655, 83 N. W. 618; *Gulf, C. & S. F. R. Co. v. Hodges* (Tex. Civ. App.), 24 S. W. 563; *Dunn v. Kemp & Hebert*, 36 Wash. 183, 78 Pac. 782; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471; *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Heilliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458; *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51.

Gose, J—The plaintiff, in attempting to step into an elevator owned and operated by the defendant in its department store, sustained a serious injury, for which she seeks redress in this action. There was a verdict in her favor for $800. The several motions of the defendant for a nonsuit, a directed verdict, and a judgment *non obstante*, were denied, and the motion of the plaintiff for a new trial on the ground of "inadequate damages appearing to have been given under the influ-

ence of passion or prejudice" was granted. The defendant has appealed.

It concedes that, if the court was not in error in denying its several motions, the order granting a new trial was not an abuse of discretion. Its contentions are, (1) that it was not guilty of negligence, and (2) that the respondent was guilty of contributory negligence materially contributing to and causing her injury; and hence that it incurred no liability. The material facts bearing upon these contentions may be brought within a narrow compass. The admitted facts are that appellant owned and operated an elevator in its department store, in the city of North Yakima, for the accommodation of its patrons. The respondent's evidence tended to establish that she and two companions entered the elevator and were carried to the third floor; that they stepped from the elevator, and that the respondent made a small purchase at a counter some ten or fifteen feet distant; that her companions returned to the elevator and one of them rang; that the elevator returned to the third floor and they stepped in; that it was stopped some four or five inches below the surface of the third floor, a fact observed by the one but not observed by the other; that the elevator boy started to close the door but, upon the suggestion of one or both the ladies who had stepped in, desisted; that the elevator door was about four feet in width, and was permitted to remain open a width of about three feet; that one or both of the ladies in the elevator kept calling the respondent, and that she moved slowly sidewise toward the elevator, conversing with a lady at or near the counter, until within one step of the elevator, where she turned, facing the open door and facing her companions within, and attempted to step into the elevator without looking at its floor; that she stepped upon the edge of the floor of the building with her foot at a slight angle, fell into the arms of one of her friends in the elevator, and sustained a fracture of the external semilunar cartilage of the knee, which thereafter necessitated an operation. The third floor of the store was level,

carpeted and adequately lighted. The floor of the elevator was uncarpeted. The elevator door was open, and the inference is clear, though not directly stated, that the elevator boy was at his post. Upon these facts, the jury was warranted in finding that the appellant was negligent. An elevator used to carry passengers is a common carrier, and one who operates it must, like all other common carriers, exercise the highest degree of care compatible with its practical operation. *Edwards v. Burke*, 36 Wash. 107, 78 Pac. 610.

The second point urged, i. e., that the respondent in failing to look at the floor of the elevator before stepping in, was guilty of negligence as a matter of law, cannot be sustained. She says that she did not notice that the elevator was lower than the floor; that she thought it was level with the floor until she fell, and that she then looked and observed that it was four or five inches below the surface of the floor. The open door, with the elevator boy at his post, was an invitation to enter; and whether, in the exercise of reasonable care which the law exacts, she ought under all the attending circumstances to have seen the situation as it was, was a question of fact for the jury. This view is supported in principle by *Wheeler v. Hotel Stevens Co.*, *ante* p. 142, 127 Pac. 840. There the plaintiff's contention was, the lights being adequate, that she stepped through an open door into an elevator shaft, thinking that she was stepping into the elevator. The defendant's contention was that the elevator door was closed. The opinion assumes that the question of her negligence was for the jury.

It has been held in other jurisdictions that it is not negligence *per se* to fail to look before entering an elevator where the door is open. *Tousey v. Roberts*, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. 655; *Southern Building & Loan Ass'n v. Lawson*, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. 804; *People's Bank of Baltimore v. Morgolofski*, 75 Md. 432, 23 Atl. 1027, 32 Am. St. 403; *Burgess v. Stowe*, 134 Mich. 204, 96 N. W. 29; *Colorado Mtg. & Inv. Co. v. Rees*, 21 Colo. 435, 42 Pac.

42; *Fisher v. Cook*, 23 Ill. App. 621; *Phillips Co. v. Pruitt*, 26 Ky. Law 831, 82 S. W. 628.

In *Tousey v. Roberts*, the plaintiff entered a hallway from the street, walked towards the elevator, and as she approached it the door was thrown open. She passed through and the car being above, she fell to the bottom of the shaft, sustaining serious injuries. Her contention was that the hallway which led to the elevator was not lighted, but whether it was then so dark that a light was required was a disputed fact. The defendant insisted that, if she had looked attentively, she could have seen that the elevator was absent, and that if she had listened she could have heard it descending from above. In addressing itself to the question of plaintiff's failure to look and listen before passing through the door, the court said:

"An elevator for the carriage of persons is not, like a railroad crossing at a highway, supposed to be a place of danger, to be approached with great caution; but, on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen or make a special examination."

We are in full accord with that view. In the *Lawson* case, the plaintiff stepped down about 12 inches into an elevator through an open door, caught hold of one of the ropes by which the carriage was operated, and attempted to set the carriage in motion. Fearing that she had made a mistake, she attempted to step out of the shaft, when the carriage descended from above and caught and injured her. She said that she saw the door open, stepped into the shaft and thought it looked similar to one she had been accustomed to observing. It was held that the question whether she was guilty of such contributory negligence as would bar her recovery was properly left to the jury. In the *Morgolofski* case, the plaintiff's testimony was that he could not see at all in the hall, and having heard the elevator go up, the door of the elevator being open, he was sure the elevator was in place. He stepped in to take the elevator, and fell down five floors into the base-

ment. It was urged that, inasmuch as he walked into the elevator without looking to see if it was there, he was guilty of contributory negligence. The court, however, expressed the view that there was no error in leaving it to the jury to find whether, under all the circumstances of the case, the plaintiff had a right to assume that the elevator was at the fourth floor where he stepped into the shaft. In *Fisher v. Cook* and *Colorado Mtg. & Inv. Co. v. Rees, supra*, the plaintiff stepped into an open elevator shaft, where there was evidence that the lights were inadequate, and the question of contributory negligence was held to have been properly left to the jury. In *Burgess v. Stowe, supra*, the court said:

"There is some dispute as to whether or not the shaft was well lighted; plaintiff saying that the place was quite dark, while the defendant's testimony indicates that it was quite light. We think it clear, however, that, had plaintiff been called upon to give particular attention to where he was stepping, he could not have failed to see that the elevator was not before him."

In *Valentine v. Northern Pac. R. Co.*, 70 Wash. 95, 126 Pac. 99, the plaintiff entered an unlighted toilet in a Pullman car, through a dark aisle, caught her finger in the door, and was injured. We held that whether her conduct met the standard of reasonable care was a question for the jury. So in this case, we think it would be going too far to hold that the plaintiff may not have the jury determine whether her conduct squared with her duty to exercise reasonable care for her own safety.

We need not review the authorities cited by the appellant. We have examined them, and in so far as they may state a different rule, we prefer not to follow them. The respondent has not filed a brief, and we have therefore passed the question as to whether the appellant may raise any issue on appeal other than to review the discretion of the trial judge in granting a new trial.

The judgment is affirmed.

CROW and PARKER, JJ., concur.

CHADWICK, J. (dissenting)—I am unable to agree with my associates. Plaintiff's negligence cannot be denied. Her testimony and that of her witnesses shows that she took no account of her own safety. She had ridden frequently on the elevator, and was familiar with its operation as well as all the surroundings. It was light, and if she had looked she could have seen that the elevator was not quite flush with the floor. She says:

"Q. Up to the time you fell you hadn't looked to see how far the elevator was above or below the floor? A. I didn't look down, no. Q. The first time you looked down when you went to enter this elevator to go down after making this purchase was after you had fallen and you looked back to see what had caused you to fall, was that correct? A. Yes, sir. Q. Up to that time you hadn't paid any attention to whether the elevator floor was level with the storeroom floor or not? A. I had not looked. Q. You had not looked? A. No, sir."

The cases cited as sustaining the argument advanced in the majority opinion are cases where the complaining party had stepped into an open elevator shaft. These cases were properly decided. We are furnished with no authorities, and I have been unable to find any which were decided upon facts similar to those presented by this record. In all of the open-shaft cases, some excusatory facts will be found, so that the court can say, as a matter of law, that the party injured was not guilty of contributory negligence, or that the circumstances are such that it should be left to the jury to say whether the negligence of the plaintiff contributed to the injury. This court, in common with all others, has held that, where the facts are admitted or are all one way and but one inference can be drawn therefrom, the question of contributory negligence is one for the court and not the jury. *Budman v. Seattle Elec. Co.*, 61 Wash. 281, 112 Pac. 356.

While the rule is that one operating an elevator is a public carrier and bound to exercise the highest degree of care, the rule is as well settled that a person using a public vehicle is bound to exercise due or reasonable care for his or her own

safety. There is a mutual burden. As the owner owes a duty in operation, so does the public owe a duty in the use. This record not only negatives all showing of care on plaintiff's part, but affirmatively shows that she did not use any care. As has been said many times, courts should not shut their eyes to the commonplace things of life. We all know, as plaintiff knew, that an elevator is a moving vehicle; that it rarely is stopped on the true plane of the floor; that for this very reason persons familiar with the use of elevators will, in stepping in or out, involuntarily use care, unless they be abstracted entirely, as plaintiff admits she was. The rule laid down in this case is entirely too harsh, and puts a burden upon the owners of modern office and business blocks that is not sustained by reference to the elementary principles of the law. Such elevators are operated for convenience and not for profit, and we should not hold to a rule so strict that it is impossible of performance.

I think the judgment of the lower court should be reversed and the case dismissed.

MOUNT, C. J., concurs with CHADWICK, J.

[No. 10398. Department One. January 8, 1913.]

SEATTLE LAND AND IMPROVEMENT COMPANY, *Appellant*, v. M. P. BLUM *et al.*, *Respondents*.[1]

TAXATION—REDEMPTION BY MINOR HEIR—TENDER OF TAXES—STATUTES—IMPLIED REPEAL. Repeals by implication not being favored, Rem. & Bal. Code, § 9259, which is a special act permitting a minor to redeem his real property from tax sale, at any time after sale and before the expiration of one year after removal of his disability, was not repealed by the general act of 1907, p. 398, Rem. & Bal. Code, § 162, providing a limitation for the bringing of actions to set aside tax deeds or for the recovery of land sold for taxes.

TAXATION—REDEMPTION BY MINOR—TENDER. A tender of taxes by a minor, pursuant to Rem. & Bal. Code, § 9259, providing for re-

[1]Reported in 128 Pac. 1066.

demption from tax sales by minors, *ipso facto* operates as a redemption, the right being highly favored, requiring a liberal construction.

TAXATION—REDEMPTION—PERSONS ENTITLED—GRANTEE OF MINOR. The right of a minor to redeem his land sold for taxes, within one year after attaining majority, given by Rem. & Bal. Code, § 9259, is assignable, and may be exercised by his grantee; especially where he warranted the title.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 16, 1912, upon sustaining a demurrer to the complaint, dismissing an action to quiet title. Reversed.

Granger & Clarke and *Emmons & Emmons*, for appellant.

J. W. Brown, for respondents.

GOSE, J.—This is an appeal from a judgment sustaining a demurrer to the plaintiff's second amended complaint and dismissing the action. The action was dismissed after the plaintiff had elected to stand upon its pleading. The complaint, after alleging the appellant's corporate existence and the payment of its last annual license tax, avers that, on November 15, 1902, and for several years prior and subsequent thereto, one Blinn S. Bryant, as the minor heir of his mother, was the owner in fee of the real property in controversy; that he attained his majority on the 29th day of October, 1909; that on the date first mentioned, the county treasurer of King county sold the property to the respondent husband for the taxes of 1886, and that on the 18th day of December, 1902, the treasurer executed and delivered to the purchaser a tax deed therefor; that on or about the 28th day of June, 1910, Bryant conveyed the property to the appellant by a warranty deed, and that it is the owner thereof; that on the 26th day of October, 1910, the appellant, "in its own interest and in behalf of the said Blinn S. Bryant," tendered to the county treasurer the amount required by law for the purpose of redeeming the property from the tax sale; that the treasurer refused the tender, on the ground that he did not know Bryant's age and

that he did not know what, if any, improvements had been placed upon the property; that within one year after the minor reached his majority it made a like tender to the respondents, which they refused; that the property is vacant and unimproved; and that the appellant has deposited in court the amount of money necessary to effect the redemption. The prayer of the complaint is that the appellant's title to the premises be quieted, and that it be decreed to be the owner in fee simple. The demurrer was rested upon two grounds, (1) that the complaint does not state facts sufficient to constitute a cause of action; and (2) that the action was not commenced within the time limited by law.

The respondents rest their right to an affirmance of the judgment upon two grounds: (1) that the provisions of the code (Rem. & Bal. § 9259), permitting a minor heir to redeem his real property from a tax sale "at any time after sale and before the expiration of one year after such disability has been removed," was repealed by Laws 1907, p. 398 (Rem. & Bal. Code, § 162); and (2) that the right to redeem, if it exists, was personal to the minor, and could not be exercised by his grantee, either for itself or on behalf of itself and its grantor.

The statute permitting a minor heir to redeem his property from a tax sale, within one year after he attains his majority, is a special act upon a special subject, and deals with a special and favored class whom the law has ever deemed it wise and expedient to protect against both such acts done or suffered to be done by them as may be disadvantageous to their material welfare. The action is neither waged to set aside a tax deed nor to recover possession of premises. The premises were vacant, unimproved, and unoccupied when the suit was commenced. The object of the action is to have it decreed that the tender of the taxes *ipso facto* operated as a redemption from the tax sale, and incidentally to quiet title. The purpose of the act of 1907 was, as its title expresses, to provide a limitation for the bringing of actions to set aside or cancel tax deeds or for the recovery of lands sold for taxes.

Neither the title nor the body of the act remotely suggests an intention to cut off the minor's right of redemption. One of the fundamentals of statutory construction is that repeals by implication are not favored.

"The rule is that a general statute does not repeal a special one, unless such is the plain legislative intent, even when they may contain somewhat inconsistent provisions." *State ex rel. Abbott v. Ross*, 62 Wash. 82, 113 Pac. 273.

See, also, *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4; *Meade v. French*, 4 Wash. 11, 29 Pac. 833; *Hulsman v. Deal*, 82 Kan. 518, 108 Pac. 849. The controlling principle is tersely stated by the late Chief Justice Dunbar in *Meade v. French*, as follows:

"Hence the rule obtains that repeals by implication are not favored, and courts will seek to harmonize the laws and preserve them, rather than declare them abrogated or repealed; and if by any reasonable construction they can stand together, they will both be enforced and in construing statutes for the purpose of ascertaining whether repugnancy really exists, as well as to gather the intention of the legislature in any particular, the whole statute on the subject must be construed together."

The right of redemption conferred upon minors by the statute is a highly favored right, and statutes conferring it are accorded a liberal interpretation. *Hoffman v. Peterson*, 123 Wis. 632, 102 N. W. 47. The better view is that a tender of the taxes in pursuance of the statute *ipso facto* operates as a redemption. *Hulsman v. Deal, supra; Kington v. Ewart*, 85 Kan. 292, 116 Pac. 495. The language of the Kansas statute construed in *Hulsman v. Deal*, is:

"The lands of minors may be redeemed at any time before such minor becomes of age, and during one year thereafter."

The court, in speaking of this provision, said:

"The plaintiff, having tendered the amount due for taxes within the time allowed therefor, must be considered as having redeemed the land;"

under the provisions of the statute quoted. The cases cited by the respondents, declaring the impregnable character of a tax deed under the act of 1907, all have reference to adult owners. Our conclusion is that the right of a minor heir to redeem from a tax sale is unaffected by the act of 1907.

The second contention is equally untenable. It is alleged that the tender was made by the appellant "in its own interest and on behalf of" Bryant. The right accorded by the statute to a minor heir was intended to be, and is, a tangible, valuable right, and it may be exercised by his grantee, who acquires the title fortified by the minor's warranty. *Stout v. Merrill*, 35 Iowa 47. Moreover, the appellant's grantor, by warranting title to his grantee, continued to have the same interest in the redemption of the land that he had before he conveyed. *Hoffman v. Peterson*, *supra*. Speaking to this question, the court said:

"We are persuaded that the true policy of our statutes is that this privilege shall be enjoyed by the minor throughout the full statutory term, if the minor's interests may be subserved or protected thereby, though it may not be exercised if of no possible benefit to the minor. *Cousins v. Allen*, *supra*. In the present case, by warranting title to his grantees, Albert Johnson continued to have the same interest in the redemption of the land as if he had made no deed at all. If denied that right, his pecuniary loss is the value of the land, as measured, at least, by the price for which he was able to sell it."

The judgment is reversed, with directions to overrule the demurrer.

PARKER, CROW, and CHADWICK, JJ., concur.

[No. 10574. Department Two. January 18, 1913.]

HARRIET E. PATTERSON, *Appellant*, v. RALPH M. TOLER, *Respondent*.[1]

TAXATION—FORECLOSURE BY COUNTY—SUMMONS—NAME OF OWNER. In a general tax foreclosure prosecuted by the county, the summons is sufficient if the property is properly described, notwithstanding a mistake in the name of the owner.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered January 25, 1912, dismissing an action to set aside a tax foreclosure, upon sustaining a demurrer to the complaint. Affirmed.

Geo. Venable Smith and *T. H. Patterson*, for appellant.

Cochran & Thorp, for respondent.

FULLERTON, J.—In 1907 the county of Clallam, in a general tax foreclosure proceeding, sold for delinquent taxes certain lots and parcels of land, situated in that county, now claimed by the appellant. This action was instituted by her to set aside the foreclosure proceedings and the deed executed thereunder, as clouds upon her title. A demurrer was interposed and sustained to the complaint, and on the appellant's refusing to plead further, a judgment of dismissal, and for costs, was entered against her. This appeal followed.

In the complaint it is alleged that, for the years 1900 to 1905, inclusive, the property in question appeared upon the assessment rolls as the property of Warren J. Hoag; and for the years 1906 and 1907, it appeared as the property of W. J. Hoag. In the certificate of delinquency issued to the county, which furnished the foundation for the foreclosure proceeding, the property was shown as the property of W. G. Hoag, and in the published summons the name of W. G. Hoag followed the description of the property as the owner

[1]Reported in 129 Pac. 107.

thereof; the property being during all of such times the property of Warren J. Hoag.

It was the failure to insert in the published summons either the name of the person shown on the assessment roll to be owner of the property, or the name of the actual owner thereof, that is thought to be so far fatal to the foreclosure proceedings as to render the same void. The appellant cites a number of cases from this court to sustain her contention to the effect that it is necessary to a valid foreclosure for delinquent taxes that the summons be addressed to the actual owner of the property, or to the person shown on the assessment roll to be such owner. But the cases cited are all cases where the certificate of delinquency was issued to and foreclosed by a private individual; none of them having reference to a general foreclosure of delinquency certificates brought by the county on certificates issued to the county. In the latter class of cases, a different rule obtains; the summons being sufficient in such cases if the property itself is properly described, notwithstanding a mistake may be made in the name of the person shown to be the owner. This is made clear by the case of *Noble v. Aune*, 50 Wash. 73, 96 Pac. 688, where we said:

"It is contended by appellants that the original tax proceeding was invalid for the reason that the court had no jurisdiction, inasmuch as in the foreclosure proceedings the name of the owner was given as 'Henry Acenie' instead of 'Henry Aune', as it had appeared in the tax roll for some of the years for which taxes were delinquent. We think this contention cannot be upheld. This court has repeatedly held a tax foreclosure by a county to be a proceeding *in rem*. *Woodward v. Taylor*, 33 Wash. 1, 73 Pac. 785, 75 Pac. 646; *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267; *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385; *Morrison v. Shipman*, 37 Wash. 171, 79 Pac. 632; *Jefferson County v. Trumbull*, 34 Wash. 276, 75 Pac. 876; *Spokane Falls & N. R. Co. v. Abitz*, 38 Wash. 8, 80 Pac. 192; *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599; *Leigh v. Green*, 193

U. S. 79, 24 Sup. Ct. 390, 48 L. Ed. 623; *McQuade v. Jaffray*, 47 Minn. 326, 50 N. W. 233.

"Where a county prosecutes a general foreclosure, it is immaterial what name or names are used in the summons, or whether any is used. The summons is sufficient, in the absence of fraud, if the property is properly described. We recognize a clear distinction between a foreclosure by a county and one by an individual. In the latter case, greater strictness is required—the requirements as to service of summons being much the same as in the foreclosure of a mortgage. Laws 1901, pp. 384, 385; *Anderson v. Turati*, 39 Wash. 155, 81 Pac. 557; *Pyatt v. Hegquist*, 45 Wash. 504, 88 Pac. 933."

The appellant attacks the case cited, contending that it is inconsistent with other decisions of this court and contrary to a proper construction of the statute. But a reexamination of the question suggested has convinced us that the principle of the case is sound, and that no cause exists for a modification of the rule therein announced.

The judgment is affirmed.

MOUNT, ELLIS, MORRIS, and MAIN, JJ., concur.

[No. 10615. Department One. January 18, 1913.]

JOE GASOF, *Respondent*, v. STANDARD ICE COMPANY *et al.*, *Appellants*.[1]

MASTER AND SERVANT—INJURY TO THIRD PERSONS—NEGLIGENCE. Where a contractor on street work knew that persons were working in an excavation near the street line, he is liable for injuries caused by his servants' negligence in placing a rock where it rolled down and injured a man rightfully at work in the cut.

TRIAL—ISSUES AND PROOF—INSTRUCTIONS. Upon an issue as to whether defendant had notice of work going on in a cut near the street line under a city permit, the jury may take into consideration the fact that a permit had been issued for such work, where there was evidence that the defendant had seen the permit, and had inspected the work, and urged its completion; since the permit was one item in the line of circumstances tending to show notice.

[1]Reported in 129 Pac. 101.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $1,000 is not excessive where plaintiff was severely injured by being struck by a boulder, two ribs were broken and he suffered other bruises.

MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE. An employer is not liable to a servant working in an excavation, and injured through the negligence of servants of another employer, working in a street above, in plowing up and rolling a boulder down into the excavation, where there was nothing to indicate that there was any danger from falling objects.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 27, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a common laborer employed in excavation. Affirmed in part and reversed in part.

Ballinger, Battle, Hulbert & Shorts, for appellant Standard Ice Company.

John W. Roberts, for appellant McLellan.

James Kiefer, for respondent.

MOUNT, J.—Action for personal injuries. The plaintiff recovered a judgment upon the verdict of a jury for $1,000 against the two defendants to this action. The defendants have appealed separately. The facts are as follows: Defendant McLellan had a contract with the city of Seattle to grade Elliott avenue, running in a northly and southerly direction. Cedar street, running easterly and westerly, intersects Elliott avenue at right angles. At the point of intersection to the westerly of Elliott avenue there was an abrupt declivity, so that Cedar street westerly of the avenue was impassable for vehicles, and was used by pedestrians only by means of a stairway. The defendant Standard Ice Company had constructed buildings upon the west side of Elliott avenue. These buildings occupied a part of Cedar street. They were considerably below the grade of Elliott avenue. In order to protect these buildings, the ice company intended to, and did, build a concrete retaining wall in front of their

buildings below the street grade. In order to do this work it was necessary to excavate in the street. The ice company obtained from the city permission to construct this retaining wall, or area way, as it was called in the permit, in front of its property, in accordance with plans and specifications submitted to the city authorities. The ice company then proceeded to make an excavation in the side hill on the westerly side of Elliott avenue and immediately to the east of their buildings. This excavation was six or eight feet in width, and about sixteen feet in depth on the wall next to the street. It extended upon Elliott avenue and across Cedar street on the west side of that avenue. The plaintiff was employed by the ice company as a common laborer, wheeling dirt out of this excavation to the westerly.

The defendant McLellan knew that the work was being done, and urged the ice company to complete the work so that he could finish grading the avenue. His men had been engaged for a day or two plowing and scraping upon Elliott avenue, upon the east side of the avenue opposite to where the ice company were making the cut as above stated. While two of Mr. McLellan's employees were plowing about the center of the avenue, they turned up a large angular rock or boulder. These men attempted to roll this rock out of the way of the plow and place it upon a ridge between where they were plowing and the cut being made by the ice company. While attempting to do this, the rock got beyond their control and rolled down the sloping ground to the cut, and dropped upon the plaintiff, who was working there, and injured him.

The appellant McLellan argues that the court erred in submitting the case to the jury, because there was no sufficient evidence of negligence of this appellant. There was evidence to the effect that defendant McLellan knew that the ice company was making the excavation, and that the men were working therein. There was also evidence to the effect that the servants of McLellan carelessly placed the

rock or permitted it to roll down into the excavation. This clearly made a case to go to the jury as against McLellan; for if he knew that men were working in the cut, or should have known it, he was liable for his servants' carelessness in conducting their work so as to injure one who was rightfully in the cut.

During the trial, the defendant Standard Ice Company introduced in evidence a permit from the city to build the area wall between these buildings and the street according to plans and specifications approved by the city. This area wall was to be constructed near the street line, on the west side of Elliott avenue and across Cedar street.

In the course of the instructions to the jury, the court gave the following:

"Evidence of a permit is immaterial in this case except in so far as it may be considered by you in determining whether or not the defendant McLellan knew, or by the exercise of reasonable care should have known, that plaintiff was working in the trench in question. Of course the mere fact that the man was working down there without a permit would not justify the defendant in this case to be negligent to him. They should take that degree of care which they would take if he had a permit. So you are entitled to consider, then, whether or not the defendant McLellan knew, or should have known, that the men were working in that trench."

It is argued by the appellant McLellan that this instruction is erroneous, because it tells the jury that this permit was evidence of notice to McLellan that the plaintiff was working in the excavation, and was therefore prejudicial. The instruction is not so pointed as that. It simply says the jury may consider the permit in determining whether the defendant McLellan in the exercise of reasonable care, should have known of the fact that plaintiff was working in the trench. It was admitted that McLellan had seen the permit which was posted upon the ice company's building, but he claims that he did not recognize the exact place where the work was to be done under the permit. There was also evidence that he had

seen the work being done. The permit itself, and the fact that McLellan had seen it, may not have been sufficient evidence of notice that the ice company had men working there at this particular time. But the fact that the permit was posted and seen by him was sufficient to put him upon inquiry, and that, together with the showing that he afterwards examined the progress of the work and urged the ice company to complete the work, were facts which the jury had a right to consider in determining the question of notice. The permit itself when posted was but one item in the line of circumstances tending to show notice, and the court therefore was right in informing the jury that they might consider it in determining the question of notice.

The appellant McLellan also argues that the judgment is excessive. The judgment was for $1,000. The plaintiff was severely injured. He had two of his ribs broken and suffered from other bruises. We think the amount awarded is not so excessive as to justify a reduction by us.

The appellant Standard Ice Company contends that the court erred in not directing a verdict in its favor. We are satisfied that this position is well taken. It is claimed that the ice company was negligent in not furnishing the plaintiff a safe place in which to work. We find nothing in the record to indicate that dangers such as this might have been foreseen. There was no evidence that there were rocks and other dangerous objects above which were likely to roll down upon the plaintiff. If the place was unsafe, it became so only by the negligent act of the employees of Mr. McLellan, for whose acts the ice company was not responsible. The plaintiff in order to hold the ice company relies upon the rule laid down in *Richardson v. Spokane*, 67 Wash. 621, 122 Pac. 330. In that case an injured employee and the persons causing the injury were in the employment of the same master, and we held that it was the duty of the master to protect employees sent to a dangerous place against the danger of falling objects, where the dangers were created by the master with-

out notice to the servant, after he had been sent into the dangerous place. That case is therefore readily distinguishable by that fact. If the ice company had negligently sent a workman upon the street where he was likely to injure the plaintiff, this case would then be controlled by the *Richardson* case; but such is not the fact. The place where the ice company sent the plaintiff was reasonably safe. The appellant McLellan sent the men upon the street. They plowed up a hidden rock, and their negligence caused the rock to roll down upon the plaintiff.

"A master is not as a rule liable for injuries to his servants caused by the acts or omissions of third persons over whom he has no control." 26 Cyc. 1090.

In *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713, we said:

"When the danger is not known, and not suspected, and where there are no circumstances which would cause a reasonably careful man to investigate and ascertain the danger, the law will not impute knowledge of danger where the knowledge is not shown in fact."

The respondent argues that it was the duty of the ice company to place some guard around the top of the excavation in order to keep dangerous substances from rolling into the excavation; and that, if this had been done, the injury would not have occurred. The evidence did not show that there were in sight any rocks or other dangerous substances which were likely to roll down into the excavation. The contrary appeared. The place was apparently safe. There was nothing to indicate that dangers would result from that source, and it cannot be held that the ice company was required to anticipate dangers which could not be foreseen and which might be caused by some intervening responsible agency. We are satisfied, therefore, that no negligence was shown against the ice company. The cause as to it should be dismissed. It is so ordered.

The judgment is affirmed against the appellant McLellan, and reversed as to the Standard Ice Company; the latter to recover its costs against respondent.

CROW, C. J., CHADWICK, PARKER, and GOSE, JJ., concur.

[No. 10636. Department Two. January 18, 1913.]

NICK KOLOFF, *as Administrator etc., Respondent*, v. CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY, *Appellant*.[1]

MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE OF FOREMAN—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. Negligence of the defendant's foreman in dropping a brick upon and killing plaintiff's decedent is sufficiently shown where it appears that he was tossing the bricks around immediately above where he had set the men to work and that one of them fell, and that deceased was killed by the fall of a brick.

SAME—FELLOW SERVANT—FOREMAN IN CHARGE OF WORK—SAFETY OF PLACE—NECESSITY OF SUPERVISION—ASSUMPTION OF RISKS. Where a foreman negligently tossed bricks around immediately above the place where he had set men to work, killing a man, he infringed the duty of the master to furnish a safe place, and there is no question of fellow servants or assumption of risks involved.

DEATH—ACTIONS FOR WRONGFUL DEATH—PROOF OF MARRIAGE AND DEPENDENCY—EVIDENCE—SUFFICIENCY. In an action for wrongful death, there is sufficient evidence of marriage of the deceased and dependency, where his brother testified that he attended the wedding in a foreign country ten years before, that the ceremony was performed by a priest according to the customs of the country, and that the parties lived together until the deceased came to this country and that three children were born to them.

EXECUTORS AND ADMINISTRATORS—APPOINTMENT—WAIVER OF RIGHT—RIGHT TO QUESTION—COLLATERAL ATTACK. An appointment of a suitable person as executor cannot be collaterally attacked by a third person, as having been made before the expiration of the forty days in which the widow and next of kin could apply, where they waived their right by failing to apply within the forty days.

[1]Reported in 129 Pac. 398.

DEATH—ACTION BY ADMINISTRATOR—AUTHORITY—CONSENT OF BENEFICIARY—NECESSITY. In an action by an executor for wrongful death, brought for the benefit of the widow and children of the deceased, it must be shown that the widow has sanctioned and authorized the suit.

SAME—EVIDENCE OF CONSENT—ADMISSIBILITY. The consent of a widow to an action by an executor for the wrongful death of a husband cannot be shown by a letter written by the sister at her request, she being unable to write, asking her brother-in-law to send her money for the support of herself and children.

SAME—EVIDENCE OF CONSENT—FOREIGN DOCUMENTS—AUTHENTICATION. Such consent cannot be shown by a certificate of the mayor and secretary of a foreign city, which was not such as to constitute evidence at common law or under any state or Federal statute.

SAME—CONSENT OF WIDOW—FOREIGN ACKNOWLEDGMENT. Such consent cannot be shown by a paper purporting to be signed by the widow, her signature being authenticated only by an acknowledgment in sufficient form before the mayor of a foreign city using a seal; since proof of the execution should have been made by testimony or deposition.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 30, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

Geo. W. Korte (*F. M. Dudley*, of counsel), for appellant.

Walter L. Johnstone and *S. A. Keenan*, for respondent.

ELLIS, J.—This is an action by the administrator for the benefit of the widow and minor children of the decedent, to recover damages from the defendant railway company for its alleged negligence resulting in the decedent's death. The evidence introduced by the plaintiff fairly established the following facts: The decedent was a common laborer, about thirty-five years of age, a native of Bulgaria, and had resided in this country but about twenty-six months. The defendant, in September, 1911, was constructing an oil tank at Moncton, now Cedar Falls, Washington. The lower portion was of concrete, and above this, of brick work upon which were to rest two 12 by 12 wooden beams for the support of a large

steel oil tank. This and various other work was being done in that vicinity, and a number of men, including the deceased, were there employed under the direction of a foreman of the defendant. The concrete and brick work of this structure constituted a hollow, octagonal tower, about forty feet high, which had been completed at the time of the accident.

On September 19, the foreman called eight or ten men, among them the deceased, from other work, to assist in hauling up, by means of a rope and tackle, the timbers to be placed across the top of this tower. Near the bottom was a door, and the timbers were being hauled up from the inside. Two men were placed inside the tower to attach and guide the rope, while the deceased and five other men were directed by the foreman, who was in immediate charge of the work, to stand near the door on the outside and pull on the rope at his command. The foreman and another man were on top of the tower, at a point almost immediately above the six men. The first timber was hauled up without mishap. After the second timber was started, some difficulty was experienced, and it was lowered for readjustment of the rope by the men inside. While this was in progress, the foreman was engaged in shifting the position of certain loose bricks on the top of the tower, tossing them from one position to another immediately above the six men. He had been so engaged for three or four minutes when a brick fell, striking the deceased and killing him. At the time one of the two men on top of the tower—no witness could say which—called out, "Look out below," and immediately afterwards, "My God, I have killed a man." While no witness testified to seeing a brick leave the foreman's hands and hit the deceased, one man said he saw one of the bricks tossed by the foreman fall from the tower and strike the timbers of a narrow scaffold above the men below; that he could not see the man below, but immediately ran to the tank and saw the man lying down. There was no evidence

tending to show that the deceased was ever on top of the tower, or had ever worked upon it or about it, or that he had any knowledge or warning of any kind that there were loose bricks upon it. The defendant offered no evidence.

The complaint charged as negligence, (a) the throwing of or causing the brick to fall by the defendant's foreman in charge of the work; (b) the placing of deceased in a dangerous and extra hazardous position of which he had no knowledge or means of knowledge; (c) failure of the defendant to provide the deceased with a safe place of work; (d) failure to provide any means to protect the deceased from carelessness or negligence on the defendant's part. The cause was tried to a jury. Defendant's motion for a nonsuit was overruled. The jury returned a verdict for $10,000. Defendant's motion for a new trial was overruled, and judgment was entered upon the verdict. The defendant appealed.

The appellant first contends that there was no evidence to show, either directly or indirectly, what caused the brick to fall. As we have seen, there was direct evidence that the foreman was tossing the bricks from one position to another and that one of them fell. There was no evidence that more than one brick fell, and the evidence was conclusive that a falling brick killed the deceased. The evidence was ample to warrant the jury in finding that the negligence of the foreman caused the brick to fall. The cases from this court cited by the appellant are not apposite. In *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912 D. 433, there was no evidence of any human agency in connection with the fall of the plank. In *Hanson v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457, there was no evidence, either direct or circumstantial, to show what caused the accident. In *Frengen v. Stone & Webster Eng. Corp.*, 66 Wash. 204, 119 Pac. 193, the facts were in no sense similar to those here presented.

It is also contended that, if the cause of the fall of the brick was shown, it was something over which the appellant as master had no control and was the result of an omission of fellow service. This is equally untenable. Without attempting to pursue the tenuous distinctions suggested by the appellant, it will be sufficient to say that the negligent act of the foreman infringed a duty which the appellant as master owed to the deceased, namely, the exercise of reasonable care to furnish a reasonably safe place of work and to keep it reasonably safe. There is no question of fellow service involved. *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369. If the foreman did not represent the master, then there was a confessed lack of reasonable supervision looking to the safety of the servant's place of work. *Martin v. Hill*, 66 Wash. 433, 119 Pac. 849; *Hicks v. Jenkins*, 68 Wash. 401, 123 Pac. 526. If he did represent the master, then his negligence in that capacity rendered the place of work unsafe. He should not have moved the bricks nor permitted them to be moved without warning the men below. The case is simple and typical. It falls directly within the principles announced by this court in the following decisions: *King v. Griffiths-Sprague Stevedoring Co.*, 45 Wash. 425, 88 Pac. 759; *McLeod v. Chicago, Milwaukee & P. S. R. Co.*, 65 Wash. 62, 117 Pac. 749; *Nelson v. Willey Steamship & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *Howland v. Standard Milling & Logging Co.*, 50 Wash. 34, 96 Pac. 686; *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 84 Pac. 592.

The deceased, when he took the position to which he was assigned by the foreman's command, had the right to assume that it was reasonably safe. He assumed no risk not reasonably a necessary incident to the actual work in hand. He was subjected to an unnecessary peril without warning. *Richardson v. Spokane*, 67 Wash. 621, 122 Pac. 330; *Fueston v. Langan*, 67 Wash. 212, 121 Pac. 55; *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 116 Pac. 1091; *Howland v.*

Standard Milling & Logging Co., supra; Hicks v. Jenkins, supra; Cook v. Chehalis River Lumber Co., 48 Wash. 619, 94 Pac. 189.

It is next contended that there was no competent proof that the decedent left a widow and children. His brother testified, that he was present at the wedding in Bulgaria ten years ago; that the ceremony was performed by a Christian priest, as customary in that country; that the contracting parties lived together until decedent came to this country; that three children were born to them, a girl and two boys. This evidence was competent and ample to go to the jury upon these points. 8 Ency. Evidence, 465; *Potter v. Potter*, 45 Wash. 401, 88 Pac. 625; *Nelson v. Carlson*, 48 Wash. 651, 94 Pac. 477.

It is also contended that there was no evidence of a legal appointment of the respondent as administrator. It is argued that the appointment was invalid, because it was made within forty days after the decedent's death, and there was no showing of waiver of the right to act or of a request to appoint the respondent by the widow. Whatever might be said of this contention on a direct attack, it is unavailing here. The right of the surviving spouse and next of kin, in their order, accorded by statute (Rem. & Bal. Code, § 1389), is a personal right. It is waived by a failure to apply within forty days after the death. Such failure confers upon the court discretionary power to appoint any suitable person. *McLean v. Roller*, 33 Wash. 166, 73 Pac. 1123.

The petition for administration shows that the widow and children are nonresident aliens. None of them could act. The decedent's brother, a resident of this state, who was appointed, is, so far as the record shows, a suitable person. The forty days have long since expired, and none of the persons entitled to priority have objected to the appointment. The appointment is valid as against collateral attack. 18 Cyc. 140. *Moreland v. Lawrence*, 23 Minn. 84; *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697; *Larson v. Union Pac.*

R. Co., 70 Neb. 261, 97 N. W. 313. See, also, *Wiley v. Verhaest*, 52 Wash. 475, 100 Pac. 1008; *Magee v. Big Bend Land Co.*, 51 Wash. 406, 99 Pac. 16; *State ex rel. Warren v. Ayer*, 17 Wash. 127, 49 Pac. 226.

It is next urged that there was no competent evidence that the widow and children authorized or sanctioned the bringing of this action by the administrator. This action was brought under § 183, Rem. & Bal. Code. This court has held that no right of recovery for wrongful death existed at common law, and that the right is therefore governed by the statute (*Manning v. Tacoma R. & P. Co.*, 34 Wash. 406, 75 Pac. 994); also, that the sole beneficiaries of the right of action are the widow and children and not the parents or collateral heirs (*Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; *Manning v. Tacoma R. & P. Co.*, *supra*); that the statute grants but one cause of action, to be prosecuted in a single suit by the heirs or personal representatives of the deceased (*Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162); and that, where an action is prosecuted in the name of the personal representative, it is not for the benefit of the estate, but for the sole benefit of the widow and children who share jointly in the damages recovered. *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333.

Again, this court has said that, while it is customary to prosecute such actions in the name of the widow and children, it may be prosecuted in the name of the personal representative for their benefit. *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831. In the *Copeland* case, 33 Wash., at page 421, it is said:

"It is true, the defendant cannot be subjected to two actions for the one cause, and as the widow has the first right to sue, it must be made to appear, at some stage of the proceedings prior to the time the defendant is called on to put in his defense, that the widow has knowledge of, and sanctions the action brought by the personal representative, so that she cannot afterwards repudiate his acts and maintain an

action in her own name. The danger of a defendant's being subjected to more than one action is, however, not very real. It is always within the power of the courts to protect a defendant against the possibility of being so subjected, and doubtless they will do so when called on at the proper times."

We adhere to the rule so laid down as salutary and essential to the protection, not only of a defendant, but also of the rights of the widow and children. While it is there assumed that the widow has the first right to sue, this was said in relation to the facts there presented. In that case there were no children but only a widow, and that language was used in reference to the right as between the beneficiaries and the personal representative. The right of recovery being joint and enforceable only in a single action, it follows that the right to sue as to the widow and children is coordinate, neither having a prior right as to the other. It also follows that, if an authorization or sanction of the suit by the administrator is necessary on the part of the widow, it is also necessary on the part of the heirs. We have decided that nonresident aliens, widow and children, may maintain an action for wrongful death under this statute in their own names. *Anastasakas v. International Contract Co.*, 51 Wash. 119, 98 Pac. 93, 130 Am. St. 1089, 21 L. R. A. (N. S.) 267. In another case it was held that a nonresident widow and minor children can maintain their joint action in this state, the widow procuring herself to be appointed guardian *ad litem* for the minors under § 187, Rem. & Bal. Code, for the purpose of bringing the action. *Shannon v. Consolidated Tiger & Poorman Min. Co.*, 24 Wash. 119, 64 Pac. 169. In a more recent case, we held that a minor may maintain the action by the widow as guardian *ad litem*, the widow apparently having waived her right to join in the same action personally. *Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162.

From these holdings it is deducible that, there being but one right of action, joint in the widow and children, the

widow may submit herself and *the minor children* (where under the age of fourteen) to the jurisdiction of the court, by having herself appointed guardian *ad litem* for the purpose, or in the same way submit the children to the jurisdiction, waiving her own right to join. This is doubtless because of the fact that an infant, if under the age of fourteen years, is incapable of initiating an action, and the mother is the nearest possible (to use the words of the statute, Rem. & Bal. Code, § 187) "relative or friend." But since the suit may also be maintained in the name of the personal representative for the benefit of the widow and children, and since, as held in the *Copeland* case, knowledge and sanction of the widow as to the bringing of the action must be shown, and by parity of reasoning the sanction also of the minor children, it would seem logically to follow that the widow may initiate the action by the personal representative by giving this consent or sanction for herself and for the children, and we so hold.

The question is thus reduced to this: Was there competent and sufficient evidence that the widow, for herself and the minor children, authorized or sanctioned the bringing or prosecution of this action for their benefit? The evidence offered and submitted was as follows: (1) A letter in Bulgarian, without signature, with an offer to prove that it was in the handwriting of the decedent's sister. It was not translated, but the interpreter stated that it purported to be written for the widow who could not write, to the decedent's brother Nick Koloff begging him to send her money with which to support the children and buy the things necessary therefor. This was, of course, incompetent for any purpose. It authorized no suit and was moreover hearsay. (2) A certificate, also in the Bulgarian language, with an offer to prove that the signature thereto purported to be that of the mayor and secretary of the city where the widow lived, and that the paper purported to certify that Nick Koloff, the administrator, is a brother of the decedent, and that the

three children therein named are the decedent's children, and stating that she authorized and directed Nick Koloff to bring the action for her and the children. The paper bears the impression of a rubber stamp which may be assumed to be the official seal of the mayor. There is no tenable theory upon which this paper can be held admissible for any purpose. It did not purport to be signed by the widow, either by mark or otherwise. As a certificate, it is not such as to constitute evidence either at common law or under any statute either Federal or of this state. (3) There was admitted in evidence, over objection that it was incompetent and that no foundation had been laid for its admission, a paper typewritten in the English language, purporting to be signed by Marie Koloff by mark, and purporting to authorize and sanction the bringing and prosecution of the action for her and the minor children, naming them. There were no witnesses to the signature. It purports to have been acknowledged in sufficient form before some officer whose title is written in a foreign language, presumably Bulgarian, authenticated by the impression of a rubber stamp or seal, the legend of which impression is also in a foreign language. None of the foreign words were translated by the interpreter. The venue is the city of Kostel, Kingdom of Bulgaria, and it is asserted that the certifying officer was the mayor of that place and the impression that of his official seal. Assuming, without deciding, that we would take judicial notice of this seal as proving the official character of the certificate of acknowledgment in a proper case, still this paper on such authentication was not properly admitted without further proof of its execution. It is not such an instrument as is required by any law of this state to be acknowledged. Rem. & Bal. Code, § 8758. It would not be entitled to record by reason of being acknowledged. Rem. & Bal. Code, § 8760. The purpose of acknowledgment is authentication for record. The certificate of acknowledgment only proves the execution of an instrument entitled by law to record when acknowledged.

Such a certificate would not prove the execution of a promissory note, a letter, or any other similar document. The instrument here in question lacks many of the elements of a power of attorney, either special or general. But even if it might be held a power of attorney it would not be authenticated by an acknowledgment. It is not a power to convey, or in any manner affecting, real estate, and is not entitled to record. Rem. & Bal. Code, § 8786. We know of no statute of this state, and have been cited to none, authorizing the authentication by acknowledgment and the recording of a power of attorney not affecting real estate, excepting certain powers relating to corporate agency and the like. Since the purpose of acknowledgment is authentication for record, and only as incidental thereto the certificate proves the execution of the instrument, it is only proof of the execution of an instrument entitled to be recorded. This is not such an instrument. The proof of the execution of the instrument should have been made by the testimony or deposition of some one who saw her sign it.

Other assignments of error go to the instructions. It will not be necessary to review them, since what we have said of the evidence sufficiently disposes of them.

Since this failure of proof does not go to the actual right of recovery, and since the action was properly brought if actually authorized, we would not be warranted in directing a dismissal. If the trial court had not held the acknowledgment a sufficient proof of execution, other proof might have been furnished. The judgment is therefore reversed, and the cause is remanded for a new trial, or for a dismissal without prejudice, at the respondent's option.

MOUNT, FULLERTON, MORRIS, and MAIN, JJ., concur.

[No. 10467. Department Two. January 18, 1913.]

JOHN GOODFELLOW, *Respondent*, v. FIRST NATIONAL BANK, *Appellant*.[1]

ACTIONS—PARTIES PLAINTIFF—CAPACITY TO SUE—TRUSTEE OF EXPRESS TRUST. One having a deposit in a bank as agent may sue in his own name to recover the same, as he is a trustee of an express trust, within Rem. & Bal. Code, §§ 179,180, providing that every action shall be prosecuted in the name of the real party in interest, except that an action by a trustee of an express trust (defined as a person with whom or in whose name a contract is made for the benefit of another) may be prosecuted without joining the party for whose benefit the suit is prosecuted.

BANKS AND BANKING—CHECKS—DELIVERY TO AGENT—PAYMENT—FORGED INDORSEMENT. Where a check is drawn in favor of a principal and delivered to the payee's agent, the drawer does not vouch for the right of the agent or other person to indorse the name of the payee on the check; and in the absence of negligence or fault by the drawer, the bank must ascertain the identity of the payee before making payment, and is liable if it pays the check on a forged indorsement.

SAME—DELIVERY OF CHECK TO AGENT—NEGLIGENCE OF DRAWER—EVIDENCE—SUFFICIENCY. Findings that the drawer of a check, which he delivered to one who claimed to be the agent of the payee, exercised due care and cannot be held for loss on a forgery of the payee's indorsement, are sustained by the evidence, where it appears that the supposed agent applied for a loan claiming to act as agent for the owners of the property, who had been known to the drawer ten years previously, that the drawer inquired for their address, and wrote them a letter making inquiry about the loan, but received no answer, and the agent delivered a forged note and mortgage purporting to be executed by the payee of the check.

Appeal from a judgment of the superior court for King county, Yakey, J., entered December 7, 1911, upon findings in favor of the plaintiff, in an action on contract, after a trial to the court. Affirmed.

Vince H. Faben, for appellant.

Peters & Powell, for respondent.

[1]Reported in 129 Pac. 90.

MAIN, J.—This is an action brought by the respondent to recover from the appellant funds which he claims to have had on deposit in appellant's bank, and which were paid out upon a forged indorsement. During the months of August and September, 1910, and for a considerable time prior thereto, the respondent was engaged in real estate and loan brokerage business at Seattle, Washington. With him was associated his son, H. A. Goodfellow. An account was kept in the appellant's bank under the name of John Goodfellow, agent. Upon this account, H. A. Goodfellow, the son, had authority to draw checks. Some time during the month of August, 1910, one D. M. Peeples sought from H. A. Goodfellow a loan in the sum of $5,000, for one Martha B. Barnes and her husband, whom he stated were clients of his and desired the money principally for the purpose of paying local assessments and taxes upon the real estate offered as security. One Sieburn was a client of respondent's office at the time, and had money to loan. Upon making an examination of the land offered as security, Sieburn indicated his willingness to make the loan. An abstract of title was thereupon delivered to H. A. Goodfellow by Peeples.

Goodfellow, upon a casual examination of the abstract, noticed that the property stood in the name of Martha B. Barnes and her husband, W. H. T. Barnes, and thereupon asked Peeples the residence of the parties owning the land. Peeples stated that the Barnes formerly lived at Blaine, Washington, but had recently moved to Portland, Oregon. The Goodfellows, both father and son, had known Mr. and Mrs. Barnes, who formerly lived at Fremont in Seattle, for something over twenty years, but had had no communication with them for ten years prior to this time. H. A. Goodfellow thereupon addressed a letter to W. H. T. Barnes at Blaine, Washington, inquiring if he desired a loan of $5,000 upon the land covered by the abstract. This letter was received by Barnes, but he made no reply thereto.

Immediately after the delivery of the abstract by Peeples to Goodfellow, it was turned over to the attorney for Sieburn for examination. The title being approved, a note and mortgage for the sum of $5,000, made out ready for signature, were delivered to Peeples by H. A. Goodfellow in order that he might have his clients execute the same. In the course of a few days, Peeples returned to Goodfellow, in his office, the note and mortgage, which purported to have been executed by Mr. and Mrs. Barnes at Portland, Oregon. Thereupon Sieburn was communicated with, and the following day Sieburn, Peeples, and Goodfellow met at the latter's office for the purpose of closing the transaction. Sieburn took the abstract and, with Peeples, went to the city hall where, with his own check, Sieburn paid assessments against the property in the sum of approximately $3,400. Sieburn and Peeples then returned to the office of Goodfellow.

Sieburn caused the portion of the $5,000 loan not consumed in the payment of assessments to be placed to the credit of John Goodfellow, agent, in the appellant's bank; and H. A. Goodfellow thereupon drew a check payable to the order of Martha B. Barnes for the sum of $926.13, which check was signed "J. Goodfellow, agent, by H. A. Goodfellow." This check was delivered to Peeples, and in the course of three or four days thereafter, Peeples caused himself to be introduced at the Mercantile Bank in the city of Seattle, and thereupon presented the check, which at that time bore the following indorsement, "Martha B. Barnes, Dave Arlington, D. M. Peeples." The check was cashed by the bank, Peeples thereupon opening an account, and the sum of $200 was deposited to his credit. The check passed through the clearing house, and was paid by the bank of the appellant; this bank relying upon the indorsement of the Mercantile Bank. A few days later, and on September 7, a second check, for the sum of $432.01, was made out, payable to the order of Martha B. Barnes, and delivered to Peeples. This check took substantially the same course as

the preceding one, and was ultimately paid by the bank of the appellant.

Some two weeks after these checks had been paid, it was discovered that the name of Martha B. Barnes on the back thereof was a forgery. It further appears from the evidence in this case that Martha B. Barnes and her husband W. H. T. Barnes had not been in the city of Portland at the time the note and mortgage purported to be executed there; neither had they executed the note or mortgage at any other time or place. Peeples was in fact not their agent. They had not authorized him or any other person to procure a loan for them. Subsequently the respondent drew his check for a sum sufficient to cover the amounts covered by the two checks on which the name of Martha B. Barnes was forged, and presented the same to the appellant's bank, where payment was refused. Thereupon this action was brought. The cause was tried to the court without a jury, and judgment rendered in favor of the respondent for the amount of the two checks in question, from which judgment the cause was brought here on appeal.

The first contention of the appellant is that the plaintiff has no legal capacity to sue, for the reason that the suit was not brought in the name of the real party in interest. In support of this contention, the appellant cites Rem. & Bal. Code, § 179, which provides: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided by law." But the succeeding section, 180, provides, among other things, that a "trustee of an express trust may sue without joining the person for whose benefit the suit is prosecuted," and then defines what a trustee of an express trust is within the meaning of this section. Such definition is as follows: "A trustee of an express trust within the meaning of this section shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." The right of the appellant to bring the action in his own name, under § 180 of

the code, is amply supported by authority. *Citizens' Nat. Bank v. Columbia County*, 23 Wash. 441, 63 Pac. 209; *Cremer v. Wimmer*, 40 Minn. 511, 42 N. W. 467; *Albany & Rensselaer Co. v. Lundberg*, 121 U. S. 451.

The next question presented on this appeal is, whether or not the checks in question were paid on the indorsement of the payee which was intended by the drawer. In other words, did H. A. Goodfellow intend, when he delivered the checks to Peeples, that Peeples or any person other than Martha B. Barnes should indorse her name thereon? The appellant contends that he did, and supports this contention by the citation of the following authorities: *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 11 Pac. 141, 57 Am. Rep. 171; *Maloney v. Clark & Co.*, 6 Kan. 82; *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; *United States v. National Exchange Bank*, 45 Fed. 163; *Jamieson & McFarland v. Heim*, 43 Wash. 153, 86 Pac. 165. These are all cases where the payee of the check or bill was an impostor, assuming the name of some other person for the purpose of deception, imposition, and fraud. The impostor assumed to be, and by such assumption induced the drawer of the check or bill to believe that he was in fact, the person he claimed to be. The check or bill in each case was drawn payable to such impostor, and was intended by the drawer to be indorsed and cashed by him. The principle by which all of these cases are controlled is that, where the drawer of a check or bill makes it payable to a person who represents himself to be another and delivers it to him, he thereby endows such impostor with authority to indorse and cash the check.

But this principle is not applicable in the instant case. Here the check was made payable to the order of an existing person in whose name the title to the property covered by the mortgage stood, and it was delivered to Peeples as the agent of Mrs. Barnes. In such a case, the drawer does not vouch for the right of the agent, or any other unauthor-

ized person, to indorse the name of the payee upon the check. The law imposes upon the bank on which a check is drawn payable to a certain person or order the duty of ascertaining the identity of the person therein named as payee; and it is only when the bank has been misled by some act of negligence or other fault of the drawer, that it will be justified in making payment of the check to any other than the person named therein as payee. We know of no authority against this proposition. In support of it, see: *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 77 N. E. 693, 114 Am. St. 595; *First Nat. Bank v. Pease*, 168 Ill. 40, 48 N. E. 160; *Brixen v. Deseret Nat. Bank*, 5 Utah 504, 18 Pac. 43; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa 530, 70 N. W. 769, 63 Am. St. 399; *Atlanta Nat. Bank v. Burke*, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96; *Harter v. Mechanics' Nat. Bank*, 63 N. J. L. 578, 44 Atl. 715, 76 Am. St. 224; *First Nat. Bank v. Farmers' & Merchants' Bank*, 56 Neb. 149, 76 N. W. 430; *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 22 N. E. 866, 15 Am. St. 655, 6 L. R. A. 625; *Russell v. First Nat. Bank*, 2 Ala. App. 342, 56 South. 868; *Western Union Tel. Co. v. Bi-Metallic Bank*, 17 Colo. App. 229, 68 Pac. 115; *Mercantile Nat. Bank v. Silverman*, 148 App. Div. 1, 132 N. Y. Supp. 1017.

The third contention made by the appellant is that H. A. Goodfellow was negligent in the transaction in not ascertaining from the Barnes before making the loan whether or not they desired the loan in question. It is clearly the law, as the cases above cited show, that where the drawer of a check has been guilty of negligence, or there exist such facts as will work an estoppel upon him, he must suffer the loss, rather than the bank paying it, upon a forged indorsement. The trial court found that the plaintiff, through H. A. Goodfellow, in negotiating the loan in question and in accepting the note and mortgage and in drawing and delivering the two checks payable to the order of Martha B. Barnes, exercised due and ordinary care; and that, during

the negotiations with Peeples, there came to the notice of H. A. Goodfellow no fact or circumstance which would have caused an ordinarily prudent person to inquire into the authority of Peeples to represent Mrs. Barnes and her husband, or to suspect that Peeples was not authorized by the Barnes to negotiate the loan.

A reading of the statement of facts convinces us that these findings of the court are sustained by the weight of the evidence. The judgment will therefore be affirmed.

MOUNT, FULLERTON, MORRIS, and ELLIS, JJ., concur.

[No. 10435. Department Two. January 20, 1913.]

THOMAS DAVIES, *a Minor, by his Guardian etc., Appellant*, v. ROSE-MARSHALL COAL COMPANY, *Respondent*.[1]

PLEADING—COMPLAINT—ELECTION—WRONGFUL DEATH—PROXIMATE AND CONCURRENT CAUSES. In an action for the wrongful death of a coal miner, the complaint states but a single cause of action, and it is error to require an election, where it is alleged, as proximate causes of the death, (1) that overhead rock fell upon the decedent through defendant's failure to furnish proper timbers, which caused gases to collect, and (2) that, through want of a sufficient ventilating system in decedent's working place, the gases caused decedent to fall to his death, since the two causes were concurrent.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 29, 1912, dismissing an action for the wrongful death of a coal miner, upon plaintiff's refusing to make an election. Reversed.

Brady & Rummens, for appellant.

John W. Roberts and *George L. Spirk* (*Geo. D. Emery*, of counsel), for respondent.

CROW, C. J.—This action was commenced by Thomas Davies, a minor, by his guardian *ad litem*, to recover damages resulting from the death of his father, alleged to have

[1]Reported in 129 Pac. 98.

been caused by negligent acts of the defendant. Plaintiff alleged, that the defendant owned and was operating a coal mine in which Thomas Davies, Sr., plaintiff's father, was employed as a miner; that it became necessary for the father to pass through and work in and near to chute No. 8; that to make his working place safe it was necessary that the chute should be timbered and propped to prevent it from caving, and that it should be supplied with a sufficient quantity of fresh air; that the defendant at all times failed and neglected to timber the chute or to furnish timbers for that purpose, and that the ventilating system of the mine was defective and insufficient for the purpose of providing fresh and wholesome air. Plaintiff further alleged:

"That on the 30th day of December, 1910, while the said Thomas Davies, now deceased, was a strong, robust, able-bodied man in perfect health, he entered chute 8 for the purpose of going to his working place, when by reason of having no timber supplied him with which to prop said chute, and by reason of the lack of proper timbers in said chute to support the same, stone, coal and debris fell therefrom down, upon and against said Thomas Davies and by reason of the fact that there was no air circulating through his said working place and through chute 8, a large quantity of sickening and poisonous gas was accumulated therein and permitted to remain therein to such an extent that human life could not be sustained therein and when said Thomas Davies had reached a point along said chute 8 where said gas was accumulated, on account of inhaling such gas and on account of the stone and coal and debris falling upon him, said Thomas Davies was precipitated down through said chute 8 to the bottom thereof next to the gangway and by reason thereof, died on said 30th day of December, 1910."

To this complaint the defendant interposed the following motion:

"Comes now the defendant and moves the court to require the plaintiff to elect whether or not the plaintiffs will rely upon the failure to timber or to furnish timbers as the moving or proximate cause of the death of the deceased, or whether he will rely upon the allegations in relation to poison-

ous gases in the mine, and require the plaintiff to elect upon which cause of action it will stand and proceed to the trial of this cause. If the court should overrule or deny the motion for election then the defendant moves the court to require the plaintiff to separately state and number its causes of action, for the reason that two separate and distinct causes of action are improperly pleaded and joined as one."

Upon hearing, this motion was sustained. Thereupon the plaintiff declined to amend or plead further, and the cause was dismissed. The plaintiff has appealed.

The only question presented is whether the complaint states more than one cause of action. Respondent contends that two causes are pleaded without being separately stated and numbered, and that they are inconsistent. Appellant insists that but one cause is pleaded. It is apparent from the allegations of the complaint that respondent's negligence in failing to provide timbers, and his further negligence in failing to establish and maintain a proper ventilating system, were concurrent and joint causes of the death of its employee. As suggested by appellant, there was but one death although it resulted from concurrent acts of negligence. The wrongful death caused by appellant's negligent acts, and the damages resulting therefrom, constituted but one cause of action. Possibly the absence of timbers and the consequent caving of the chute would not have caused death, but would only have stunned or have slightly injured Davies. On the other hand, the poisonous air alone might not have caused his death, for if he had not been struck by falling debris, he might have been able to escape from the foul air before falling down the chute. Were appellant compelled to state the several acts of negligence as separate causes of action, or to elect one act of negligence as the cause of action upon which to seek a recovery of damages, he might fail in his proof of the negligent act which caused death whatever his election might be. In *Dutro v. Metropolitan St. R. Co.*, 111 Mo. App. 258, 86 S. W. 915, the court said:

"A cause of action may be founded upon two separate acts of negligence which concurring in operation produce a joint result—the injury. . . . When two or more proximate causes contribute to produce an injury, each is sufficient within itself to support a cause of action for the recovery of the entire damage resulting and it logically follows that a plaintiff who pleads in his petition all of such claimed acts of negligence is entitled to recover upon proof of any one of them. *Waller v. Railway*, 59 Mo. App. 426; *Banks v. Railway*, 40 Mo. App. 464; *McDermott v. Railway*, 87 Mo. 285."

There was but one cause of action, and the motion was improperly sustained.

The judgment is reversed, and the cause remanded with instructions to overrule the motion.

MOUNT, FULLERTON, and ELLIS, JJ., concur.

[No. 10505. Department One. January 20, 1913.]

MAY RITTER, *Respondent*, v. CHARLES NORMAN, *Appellant*.[1]

NEGLIGENCE—DANGEROUS PREMISES—HOTELS—DARKENED STAIRWAY—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS. A guest in a hotel is not guilty of contributory negligence *per se* and does not assume the risks, in the mere use of a darkened stairway, made necessary because the elevator was not in commission, where there was no defect in the construction of the building, which was of modern construction, but merely a neglect on the part of the owner to use lights which had been provided.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 16, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in falling on a stairway in a hotel. Affirmed.

Kellogg & Huntoon, for appellant.

John E. Humphries and *George B. Cole*, for respondent.

[1]Reported in 129 Pac. 103.

CHADWICK, J.—Defendant was the proprietor of a hotel, and plaintiff was, on March 31, 1910, and for some time prior thereto had been, a lodger therein. Plaintiff occupied a room on the sixth floor. On the day mentioned, the elevator was out of commission, and plaintiff undertook to go from her room to the ground floor by way of the stairway leading down from floor to floor. The stairway was somewhere near the center of the building, as we suppose, not having the drawings to which the witnesses referred when upon the stand. The stairway ran at a right angle from the hall, descended a few steps to a landing, making a square turn, and then running parallel to the first flight and landing on the floor below. The testimony of the plaintiff shows that there were no windows to light these stairways, nor was there any artificial light; that the stairways and landings were dark; and in the exercise of reasonable care for her own safety, she fell on the landing which was between the fourth and third floors, and was injured. A jury has returned a verdict in her favor. From the judgment upon the verdict, defendant has appealed.

It is the contention of appellant that respondent was guilty of contributory negligence; or rather, having notice and knowledge of the darkened stairway, assumed the risk, and therefore cannot recover. Several cases, including the case of *Glass v. Colman*, 14 Wash. 635, 45 Pac. 310, are cited to sustain this argument. The discussion of the principle of contributory negligence was not necessary to the decision in that case. What is said is a broad statement of the general rule, but it does not follow that the same rule is applicable here. In the *Colman* case, the plaintiff had sought lodgings in a cheap lodging house, having board walls covered with cloth and paper. The building took fire and plaintiff was injured while escaping from it; the injury resulting from the manner of construction of which the plaintiff had notice. The court held that he could not recover, saying:

"If the construction was in fact such as to make it dangerous for a guest to occupy a room in the hotel, the plaintiff was guilty of contributory negligence when, with a knowledge of the defective construction he remained a guest of the hotel."

But that case and the others cited by appellant do not fit the case at bar. Here there is no question as to the construction of the building. It was, so far as the record goes, a building of modern type, with an elevator and stairways, and was fitted up in a way to attract the patronage of the public. It had lights in the hallways and on the stairways, which might have been lighted while the elevator was out of use. It will be seen that the injury to respondent resulted, not from any defect that was so open and obvious as to put a traveler or lodger on his guard and send him on his way, but from the failure of the appellant to use his property in such a way, and to exercise those precautions which the nature of the use of the property demanded and which he had provided to be used in just such emergencies. A guest in a hotel has a right to depend upon a stairway, and the fact that it is open and stands as an invitation at all times, and especially when the elevator, if there is one, is out of use, puts a burden upon the proprietor to use the means he has provided for the safety of his guests into operation. Nor can he complain, and charge a guest with contributory negligence or assumption of risk, merely because the necessities of his comings and goings drive him to the use of the stairway; unless indeed we are prepared to say that the mere use of a darkened way is negligence *per se*. Obviously, it cannot be so held in the absence of facts affirmatively showing carelessness on the part of the injured person. There is such a thing as reasonable care in the use of dark stairways.

The cases cited by appellant are to be distinguished. In all of them the accident would have happened to any person acting in the same way. The doorway, or shaft, or whatever the offending instrumentality was, was not intended for

the use of the party injured. Here it was so intended, and the guests of the appellant were putting the stairway to constant use. If in that use some one was injured, and the jury can say, as it has said, that the failure to provide a light was the proximate cause of the injury, the courts cannot interfere. Respondent did only what she and others were invited to do—we might say, compelled to do—while the elevator was out of repair, and she was not bound to remain in her room indefinitely waiting for the elevator. In *Marwedel v. Cook*, 154 Mass. 235, 28 N. E. 140, which is a case very similar to the one at bar, a recovery was sustained. Meeting the defense here interposed, the court said:

"The defendants contended that, if the use of the stairs was dangerous on account of the darkness, the plaintiff was not in the exercise of due care in using them. We think that, under the circumstances, this would not necessarily prevent the jury from finding that the plaintiff was in the exercise of due care. She went up in the elevator to the office on the fifth floor, where she had business, and when she had finished her business there was no way of going down except by the stairs. . . . It cannot be said, as a matter of law, that she was negligent in not going back for assistance when it became dark. That fact called for greater care, and she testified in regard to the care she used. We think it was for the jury to say whether she was negligent in going on under the circumstances, exercising the degree of care in doing so which they may have found upon the evidence that she did exercise."

But we do not have to go beyond our own decisions to find authority sustaining the principle upon which this case rests. Margaret Jordan was injured by falling into a hole in a sidewalk in the city of Seattle. The defense was that she knew of the defect, and because of her persistent use of the walk, she had assumed the risk and was guilty of contributory negligence. The court said:

"The fact that the walk was in daily use, and others passed over it without injury, and that it was left open to the public by the city, tends to show that the hole in the walk

and the walk at that place could, with ordinary care, be passed over in safety; that the danger was slight. This, we think, in connection with the evidence that the plaintiff was stepping carefully, made out a *prima facie* case overcoming the presumption arising from the knowledge of the danger. It then became the duty of the jury to pass upon the question of contributory negligence as a question of fact. We do not think the plaintiff assumed the risk and consented to the injury which followed, for she took precaution, and attempted to avoid or defeat the peril. We cannot say from the facts in this case as disclosed by the record that the plaintiff was reckless, or disregarded the dictates of ordinary prudence and discretion. Unless a court can so determine without doubt or hesitation, it is its duty to leave such questions for the jury." *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114.

Judgment affirmed.

CROW, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 10613. Department One. January 20, 1913.]

CHARLES HUBERT *et al.*, *Respondents*, v. CONNELL NORTHERN RAILWAY COMPANY, *Appellant*.[1]

TRESPASS—COMMON INCLOSURE—THROWING OPEN WITHOUT CONSENT—LIABILITY FOR TRESPASSING STOCK. Where a railroad acquired a right of way through inclosed lands, and took down the fences across its right of way, which it failed to fence up, thereby allowing stock to enter and trespass upon the lands formerly inclosed, it is liable for the damages, on the principle that an owner having an inclosure common with another cannot throw the close open without the other's consent; since no man shall use his own property in such manner as to injure that of another (PARKER and MOUNT, JJ., dissenting).

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered March 18, 1912, upon findings in favor of the plaintiffs, in an action for trespass. Affirmed.

[1]Reported in 129 Pac. 105.

Cannon, Ferris & Swan and *John M. Cannon*, for appellant.

John Truax, for respondents.

CHADWICK, J.—Appellant acquired a right of way over certain lands of respondents. These lands adjoined a public road. When the company came to build its line of railway, it took down the fences across its right of way. They remained down during the whole period of construction except when replaced by respondents. Cattle wandered from the highway onto the right of way, and from it, at will over respondents' lands, to their damage in the sum of $800, for which judgment was rendered in the court below.

Respondents relied upon two propositions of law to sustain their case; that is, that it was the duty of the appellant to so use its right of way as not to injure the land of another; and the act of 1907 entitled, "An act compelling railroads to fence their rights of way, and to protect the owners of stock injured by moving railway trains, declaring a law of negligence with regard to stock injured by railway trains." The court below was the more impressed with the first proposition. Appellant has brought its case here, insisting that neither of these positions is tenable; that it was the rule at common law, and is now in this state, that the owner of land is not liable for damage done by trespassing cattle coming onto his land and escaping to the land of another; and further, that the law of 1907, defining the duty of a railway company to fence and put in cattle guards, refers only to the liability of the company to answer for damages to stock which may be killed or injured upon its right of way. To sustain its contentions, appellant cites the following cases: *Gowan v. St. Paul etc. R. Co.*, 25 Minn. 328; *Snyder v. Pennsylvania R. Co.*, 205 Pa. 619, 55 Atl. 778; *Bear v. Chicago etc. R. Co.*, 141 Fed. 25; *Frisch v. Chicago Great Western R. Co.*, 95 Minn. 398, 104 N. W. 228.

We are inclined to believe that the judgment of the court below can be made to rest upon the common law:

"Every man's land is, in the eye of the law, enclosed and set apart from his neighbor's; and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal, invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz., the treading down and bruising his herbage. . . . Thus, if a meadow be divided annually among the parishioners by lot, then, after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes." 3 Blackstone (Lewis ed.), 209, 210.

It is also an established principle of the common law that no man shall use his own property in such manner as to injure that of another. This principle finds expression in the maxim *sic utere tuo ut alienum non laedas.* As this court and others have construed the fence laws, it may be admitted that a railroad company is not liable under the statute for the damage done by trespassing cattle which wander from their uninclosed right of way onto another's land. Those decisions have no application here; for if mine and my neighbor's field are in one inclosure, neither is liable to the other for damage done by trespassing cattle which wander from one ownership to another. But if either myself or my neighbor, in wilful disregard of the rights of the other, break the outer inclosure and leave it open so that cattle may wander at will over the premises belonging to both of us, the offender should be held to the rule that no man may so use his property as to injure that of another. It is so here. The statute does not compel the company to fence, but by so doing it may save itself certain presumptions of negligence and the hardship of certain rules of evidence. On the other hand,

the statute does not exempt a company from the established rules of law, therefore it cannot, having an inclosure common with another (and that is the most favorable position the company assume in this case), throw the common close open to the public highway. The case of *Baker v. Robbins*, 9 Kan. 303, is illustrative:

"Baker and Robbins owned adjoining farms, fenced in common—no partition fence having been made between them, though they used their farms in severalty. Baker turned a herd of cattle rightfully upon his own premises, without the consent of Robbins, however, and knowingly permitted them to wander upon the premises of Robbins and do great injury to a crop of wheat. Robbins sued Baker, and the only question for us to determine is, whether Baker is liable for said injury. We think he is. We suppose that it is settled beyond all controversy, that at common law the owner of cattle was required to take care of them, and not allow them to stray or wander upon the land of another, whether such land was fenced or not; and if he did allow his cattle to so stray or wander he was liable for all injuries they might commit."

Now, if a common owner cannot permit his own cattle to wander beyond his own boundary whether fenced or not, it would seem to follow that, if one of two using the same inclosure opens the close so as to invite stock from the highway or range, and they do damage within the common close, the one offending should be liable. For although the stock is not his and are in a sense trespassers, they are nevertheless within the inclosure at his implied license; and as against his neighbor, the rule of the common law should apply as if the stock were indeed his own. If, for its own purposes or because of its necessities, a railroad company breaks the continuity of the fence so that its common owner is damaged, it is liable; for the proximate cause is not the trespass of wandering stock, but the wilful disregard of the right of another by the party charged.

Judgment affirmed.

CROW, C. J., and GOSE, J., concur.

PARKER, J. (dissenting)—I dissent. The doctrine announced by the majority opinion will require an owner of land which at some time happens to be inclosed with land of another adjoining, to forever maintain the portion of the fence bordering his land or to build and forever maintain a fence along the entire common boundary line of the tracts. In other words, by this doctrine one owner is required to forever protect the land of an adjoining owner by fence simply because his land adjoins and an existing fence on three sides of each tract happens to inclose both tracts together. *Baker v. Robbins* quoted in the opinion is wholly foreign to the question here involved, in that the cattle were there in charge of Baker and he was responsible for their care. The case would have been exactly the same in principle had the farms been miles apart. This is not a question of the use of appellant's land, but of who shall be compelled to fence respondent's land against trespassers to whom appellant is a stranger.

MOUNT, J., concurs with PARKER, J.

[No. 10533. Department Two. January 21, 1913.]

WILLIAM J. BROUNTY *et al.*, *Appellants*, v. THOMAS E. MAJORS *et al.*, *Respondents*.[1]

APPEAL—REVIEW—FINDINGS. Findings of the trial court will not be disturbed on appeal, where they are sustained by the fair preponderance of the evidence.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered March 2, 1912, upon findings in favor of the defendants, for the value of improvements placed on the property, in an action of ejectment tried to the court. Affirmed.

Hathaway & Alston, for appellants.

Stiger & Dally, for respondents.

[1]Reported in 129 Pac. 93.

MAIN, J.—This is an action for the recovery of possession of real property and damages for the detention thereof. The cause was tried to the court, and the pivotal facts as found by the court are as follows: At the time of the commencement of this action, and for more than eight years prior thereto, the respondents were in possession of lot 6, block 12, McMahon's First addition to Arlington, Snohomish county, state of Washington. The respondents entered into possession of this lot under claim of right and in good faith, and during all the time were in open, notorious, exclusive, and adverse possession of the same. While in such possession, they placed upon the lot, subsequent to the 11th day of June, 1903, permanent improvements, which were at the time of the trial of the reasonable value of $200. The trial court further found, that the appellants were the owners of the lot, and that they were entitled to the possession thereof; that the reasonable rental value of the lot during the time of the occupancy of the same by the defendants was the sum of $40. Thereupon the court entered judgment in favor of the respondents for the sum of $160, and in favor of the appellants for the possession of the lot. From the judgment, this appeal is taken.

Three grounds of error are urged; (1) the insufficiency of the evidence to sustain the court's findings with reference to the improvements; (2) that the amount allowed the appellants in the judgment as the rental value of the lot is less than the evidence warranted; and (3) that the respondents were mere trespassers, and therefore had no legal claim against the appellants for the permanent improvements to the lot. Upon this appeal, no question of law is presented. The findings of the trial court are specifically against the appellants on all points urged. From a reading of the record, we are unable to say that the findings of the trial court are not sustained by the fair preponderance of the evidence. The judgment will therefore be affirmed.

MOUNT, ELLIS, MORRIS, and FULLERTON, JJ., concur.

[No. 10653. Department One. January 21, 1913.]

PAUL KLODEK, *Respondent*, v. MAY CREEK LOGGING COMPANY, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR. Error in the exclusion of evidence is not prejudicial, where from the whole record it appears that the fact was established by other evidence.

MASTER AND SERVANT—INJURY TO SERVANT—MEDICAL ATTENDANCE—COMPETENCY OF PHYSICIAN—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether an employer had provided a competent surgeon to treat a servant's injured knee, it is competent and relevant to show that the surgeon was holding himself out as an eye and nose specialist.

SAME—FURNISHING MEDICAL ATTENDANCE—DEFENSES—SPECIAL CONTRACT. The fact that an employer in deducting hospital dues was acting under a contract with a hospital association and turned over all dues to it, does not relieve the master from liability for failing to provide proper medical attendance, under a special contract with the servant to do so.

SAME. While a finding, contrary to the evidence, that an employer retained part of the hospital dues, which it collected for a hospital association, is technically inconsistent with a general verdict for the plaintiff based on the fact that the hospital was the employer's agent, it is not hostile thereto, where the employer had made a special contract to provide medical attendance to injured workmen.

APPEAL—REVIEW—VERDICT. The question of agency is usually one of fact for the jury, whose verdict on conflicting evidence will not be disturbed.

Appeal from a judgment of the superior court for King county, Myers, J., entered July 13, 1912, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by an employee in a logging camp. Affirmed.

Gates & Emery, for appellant.

Miller & Lysons, for respondent.

[1]Reported in 129 Pac. 99.

CHADWICK, J.—Paul Klodek sought employment at the office of an employment agency in the city of Seattle. He was furnished with transportation to the defendant's logging camp, and given a memorandum of his employment for presentation to the company. The memorandum is as follows:

"Seattle, Wash., Feb. 21, 1910.

"Received from Paul Klodek the sum of ($1) one dollar, for which we agree to furnish correct information by which he shall secure a position as bucker with May Creek Logging Co., Kennydale, on order received at 1 o'clock M. on the.....day of Feb. 21, 1910, wages $3 per day. Board, $5 per wk. Failing to do which, we promise to refund the said sum of $1 on return of this receipt without delay, together with a written statement on the back thereof from the employer that the applicant did not procure the situation. But the undersigned does not hold himself responsible for any expense incurred by the said Paul Klodek should he fail to procure the situation above stated, unless the information given at this office, upon which he acted and applied for situation should be found to have been incorrect and misleading.

"I agree to above conditions:

"(Signed) Paul Klodek.

"Crawford & Pratt, Employment Agents,
"By (signed) Pratt."

Appellant at once proceeded to the camp. Mr. Fish, the general manager and superintendent, was absent, and the memorandum was presented to a Mr. Graves, who was bookkeeper and in charge of the company's store. Plaintiff testified concerning his employment as follows:

"A. I got a ticket from the employment office and I go to the camp and to the office, I give the ticket to the man and I says are you the man that hires a bucker from the agent's office and he says yes. Q. What else then did you say? A. Well I asked him, I says now have you got the tools here and he says to me, I can get it in the office after breakfast. Q. Well, what else did you talk with the man there? A. Then he asked me, can you file your own saw? Q. What else took place? A. Well, he says that is what we want. I says how is business down there? and I says to him,

how is business down in that camp? And he says $5 board, $3 wages and $1 hospital fees. I wanted to find out how is that one dollar to a hospital; what for? Well he says if I be sick or if I be hurt, he says I give you good doctors and hospital, and attend to you until you get well. I says that is good sir, and the next day I started to work."

At the time plaintiff was employed, the defendant company was under contract with the American Hospital Association, a corporation engaged in supplying medical and surgical assistance and hospital service to employees of logging companies who might be hurt or require such service in the course of their employment. It seems that plaintiff was not directly informed of this by Mr. Graves; but, at the time of his employment and subsequent thereto, a notice of such fact was posted on the door of the bunk house. While engaged in the work assigned to him, plaintiff fell from a log or tree, striking his knee against the blade of a double-bitted axe, and received very severe injuries. The patella was cut in two pieces and the left tibia was splintered off for about five inches. Plaintiff was taken to the Providence Hospital in the city of Seattle where, after an operation by, and one subsequent consultation with, a surgeon, he was attended by the physician of the hospital association. There is no claim of negligence in the matter of the injury, but it is contended that, in violation of its contract, defendant suffered plaintiff to go without proper or sufficient treatment; that the physician of the hospital association was unskilled and incompetent, so that plaintiff was made a cripple for life. The defense is that defendant owed no obligation except to provide a hospital service of good repute, and having done so it has discharged its full duty. The charge of negligent and unskillful treatment is also denied by defendant. Such other facts as may become incidentally important will be discussed in the body of the opinion.

It is assigned as error that the court sustained an objection to a question put to a nurse who had some years' ex-

perience, the question being, "Now was this treatment that was given to the plaintiff the usual and customary treatment?" Granting that she was qualified, the nurse might have answered the question. 2 Jones, Evidence, 370. But it is not always that a case will be reversed because of the improper exclusion of evidence, where from the whole record the fact sought to be proven is testified to by other witnesses, as it was in this case. The court will treat the question as if it were an offer to cumulate evidence upon a motion for a new trial, and hold that no prejudice has resulted therefrom.

The next error assigned is that the appellant was prejudiced by the introduction of a newspaper advertisement containing the name of the attending physician and describing his specialty and place of business: "Eye & Nose, 206-7 Marion Bldg." We are unwilling to hold that this was error. We will take notice of modern tendencies and conditions in the medical profession, and if a physician holds himself out as a specialist along certain lines, it is no discredit to him to show that fact and from it raise the inference that he is not keeping up with practice in other lines. At any rate, he or those relying upon him should not complain of the burden of meeting the *prima facie* showing. The basis of the charge in this case is that the physician was incompetent and unskilled. It was for the jury to say whether he was or not, and the fact that he was specializing in other branches of the profession was a circumstance relevant to the issues.

The court submitted special interrogatories to the jury, which found in answer thereto that, in receiving one dollar per month from plaintiff, defendant was acting for itself and not as agent for the American Hospital Association; that it retained a portion of the dues; that it undertook to treat plaintiff until he was cured; that it employed the attending physician; and that it did not procure or provide a suitable, competent, or skilled physician or surgeon to treat

the respondent. All of these findings are said to be contrary to the evidence; and they are, if appellant's theory is accepted as final, for its contract with the hospital association was proved, and its testimony showing that it paid over all the money collected is not rebutted. But this theory ignores respondent's contention that there was a special contract; and the jury found, as one of its special verdicts, that appellant did make a special contract with respondent as alleged and maintained by him. If there was such a contract, it may well be that the appellant acted for itself, and that the hospital association was its agent in the performance of its contract. The finding that it did retain a portion of the dues would, under this conclusion, be technically inconsistent with, but not hostile to, the general verdict. The authority of Mr. Graves to make a contract, or, if made, that it was not within the scope of his employment with respondent, is denied. There was evidence to go to the jury upon this disputed question. The question of agency is usually one of fact, and the finding of the jury will not be disturbed where the evidence is conflicting.

Many objections are urged to the instructions given and refused. If we accept the theory of the appellant that it owed no primary duty to respondent except to use ordinary care in selecting a hospital association, most of the objections would be well taken. But we find the instructions complained of to be consistent with the theory of the respondent that there was a special contract, and those given are therefore not objectionable. The instructions refused were sufficiently covered by other instructions. There was no error.

Judgment affirmed.

CROW, C. J., GOSE, and PARKER, JJ., concur.

[No. 10397. Department Two. January 21, 1913.]

GORHAM-REVERE RUBBER COMPANY, *Appellant*, v. BROADWAY AUTOMOBILE COMPANY, *Respondent*.[1]

APPEAL — DECISIONS REVIEWABLE — AMOUNT IN CONTROVERSY — COUNTERCLAIM. Upon an appeal by plaintiff from a judgment of dismissal, carrying with it dismissal of a counterclaim acquiesced in by defendant, the amount sued for is the amount in controversy, regardless of the counterclaim; and if less than $200, the appeal will be dismissed.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 19, 1911, dismissing an action on contract, after a trial to the court. Appeal dismissed.

Leopold M. Stern (*J. W. Russell*, of counsel), for appellant.

Hughes, McMicken, Dovell & Ramsey, and *France & Helsell*, for respondent.

ELLIS, J.—The plaintiff, a California corporation, as successor in interest to Gorham Rubber Company, also a California corporation, brought this action in February, 1911, to recover for goods sold to the defendant at an agreed price of $157.25. The complaint set up the plaintiff's incorporation, payment of its annual license fee, sale of the goods, and nonpayment therefor. The defendant, by an amended answer, put in issue the incorporation of the plaintiff and the payment of its license fee, denied the sale, denied failure to pay, and set up a counterclaim for $557.85. The counterclaim was put in issue by the reply.

The cause came on for trial by the court without a jury on December 5, 1911. The plaintiff, being then unprepared to prove payment of the corporate license fee, was permitted to proceed with the trial, upon condition that it would pro-

[1]Reported in 129 Pac. 89.

cure and present a duplicate receipt for the necessary fee within two days. At the trial the defendant admitted the purchase of the goods and the failure to pay for the same. The plaintiff put in evidence a certificate of the filing of its articles of incorporation in the office of the secretary of state in this state, and a certificate showing that it had appointed an agent in this state, and evidence that it had opened an office and was doing business in this state. Evidence was also taken as to defendant's counterclaim. The court found against the defendant upon its counterclaim, and ordered judgment in favor of the plaintiff for the amount demanded in its complaint. On December 18, 1911, the plaintiff offered in evidence a duplicate receipt for its corporation license fee for the fiscal year beginning July 1, 1911. This on objection was excluded, on the ground that it did not cover the fiscal year in which the action was begun. The plaintiff requested sufficient time to procure a duplicate receipt for the fiscal year beginning July 1, 1910. The request was denied and the action was dismissed. The plaintiff appeals.

The respondent moves to dismiss the appeal, on the ground that the amount in controversy does not exceed $200. It is, of course, admitted that, but for the respondent's counterclaim, which exceeded $200 in amount, the motion would be well taken, since the amount sued for in the complaint was far short of $200. The appellant contends, however, that the original amount in controversy was the amount of its claim plus the amount of the counterclaim. The exact question here presented has never been decided by this court. In several cases we have held that the original amount sued for, and not the amount of the judgment recovered, determines the question of jurisdiction. *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469; *Bleecker v. Satsop R. Co.*, 3 Wash. 77, 27 Pac. 1073; *Trumbull v. School District No. 7*, 22 Wash. 631, 61 Pac. 714; *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705, 69 Pac. 378. We have also held that, upon

an appeal by a defendant, he occupies substantially the position of a plaintiff appealing from an adverse judgment, and that the amount claimed by him in a counterclaim becomes the appellate amount in controversy; and, if over $200, confers jurisdiction though a less amount was sued for by the plaintiff in his complaint. *Lauridsen v. Lewis*, 47 Wash. 594, 92 Pac. 440; citing 1 Ency. Plead. & Prac., p. 784, and *Sorrill v. McGougan*, 44 Wash. 558, 87 Pac. 825. In such a case, upon the principle of mutuality of remedy, the plaintiff would also have the right of appeal. The amount of the counterclaim being involved in the appeal would, if over $200, confer jurisdiction for an appeal by either side.

Here, however, the defendant has not appealed, but has acquiesced in the ruling dismissing its counterclaim, thus in effect abandoning and eliminating the counterclaim from the controversy. The plaintiff has appealed from a judgment dismissing his action, his original claim being for less than $200. The original amount in controversy on the issue raised by the complaint is all that is, or can be, involved in this appeal. Neither party could appeal from the judgment without excepting to the ruling on, and preserving the issue raised by, the counterclaim, which neither party has done in this case. The appellate jurisdiction of this court is determined by the original amount of the controversy involved here, not by what might have been involved had the appeal sought a review of the ruling on the counterclaim. An analogous situation was presented in *Puyallup Light, Heat & Power Co. v. Stevenson*, 21 Wash. 604, 59 Pac. 504, in which it was held, that where subsequent to an appeal in an action for unlawful detainer and damages the possession of the premises was surrendered, leaving but the amount of damages in controversy, which amount was less than $200, this court cannot entertain jurisdiction. The holding in that case is obviously based upon the fact that the original amount in controversy upon the issue sought to be reviewed was less than the jurisdictional amount for appeal.

A careful consideration of this question leads us to the conclusion that the correct rule is that laid down in 2 Cyc. 572, as follows:

"Where no affirmative judgment is rendered in favor of defendant upon a counterclaim, but the result of the suit is simply to defeat plaintiff's claim, his right to appeal depends upon the amount put in controversy by his complaint."

See, also, *Pickett v. Hollingsworth*, 6 Ind. App. 436, 33 N. E. 911.

The appeal is dismissed.

MOUNT, MORRIS, FULLERTON, and MAIN, JJ., concur.

[No. 10433. Department One. January 21, 1913.]

PATRICK GOLDEN *et al.*, *Respondents*, v. PILCHUCK TRIBE NO. 42, IMPROVED ORDER OF RED MEN, *Appellant*.[1]

DEEDS—DESCRIPTION—CONSTRUCTION—WHOLE INTEREST OR MOIETY. Where a grantor conveyed "his one-half undivided interest" in four lots "and" two other lots, in which last two he held the whole title, without specifying whether he intended to convey the whole or only a half interest in the last two lots, the deed must be construed to convey only a half interest therein, as against a subsequent *bona fide* purchaser.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE—PAYMENT OF TAXES BY JOINT OWNER. Payment of taxes by a grantee in a deed which was ambiguous as to whether it conveyed a half or the whole interest, is not a circumstance pointing to a construction of the deed of which a subsequent *bona fide* purchaser need take notice; especially in view of the fact that payment of taxes by a joint owner is no evidence of claim of title.

DEEDS—AMBIGUITY—CONSTRUCTION AGAINST GRANTOR. A strict construction of a deed against a grantor will not be indulged where the description was not so ambiguous as to call for extrinsic aid, and other rules did not fail, and where no possession was taken under the deed.

EXECUTORS AND ADMINISTRATORS—SALES—CAVEAT EMPTOR. The rule of *caveat emptor* applied to administrator's sales where no

[1]Reported in 129 Pac. 93.

rights of persons under disability are involved, applies only to want of power to sell, and does not prevent reliance on the title of the deceased at the time of his death, as disclosed by the records.

GOSE, J., dissents.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered October 20, 1911, upon findings in favor of the plaintiffs, in an action to quiet title. Reversed.

Coleman, Fogarty & Anderson, for appellant.

Cooley & Horan and *R. Mulvihill*, for respondents.

PARKER, J.—The plaintiffs seek a decree quieting title as against the claim of the defendant to lots 19 and 20, in block 625, in the city of Everett. Findings and judgment being rendered in favor of the plaintiffs, the defendant has appealed.

The controlling facts are not in dispute, and may be summarized as follows: Both the respondents and appellant claim title through Charles D. Sweeney, who in the year 1893 was the owner of the lots here involved, and also of lots 1, 2, 3 and 4, in block 623, in the city of Everett. In June of that year he conveyed to respondents an undivided half interest in lots 1, 2, 3 and 4, of block 623. Thereafter in January, 1896, he conveyed to respondents an interest in all of these lots by the following description:

"Does by these presents grant, bargain, sell, convey and confirm unto the said parties of the second part, and to their heirs and assigns, the following described tract, lots, or parcels of land, situate, lying and being in the county of Snohomish, state of Washington, and particularly bounded and described as follows, to wit: His one-half undivided interest in lots one (1), two (2), three (3) and four (4) in block six hundred twenty-three of Everett (623) and lots nineteen (19), twenty (20), block six hundred twenty-five (625) of Everett as shown upon the plat thereof filed for record in the county auditor's office in and for said county."

Thereafter Charles D. Sweeney died; and thereafter in February, 1901, his administrator, in pursuance of an order of the superior court made in the administration of his estate, conveyed to Philip Young "all the right, title, interest and estate of the said Charles D. Sweeney, deceased, at the time of his death, . . . in and to . . . an undivided half interest in lots nineteen (19) and twenty (20) in block six hundred and twenty-five (625), as shown upon the plat of Everett . . ."

Thereafter in June, 1905, through mesne conveyances, appellant acquired whatever title and interest in the lots passed to Philip Young by the conveyance from the administrator, and appellant has at all times since then claimed to be the owner of an undivided half interest in lots 19 and 20. It is to quiet title in respondents, as against this claim of appellant, that this action is prosecuted. The lots are vacant and unoccupied. No claim is made against the regularity of the proceedings leading up to, nor against the validity of, the administrator's deed to Philip Young, further than that Charles D. Sweeney had, prior to his death, parted with all of his title and interest to lots 19 and 20, and that therefore the administrator's deed conveyed no title or interest therein to Philip Young. No question is made against Philip Young and his grantees, including appellant, being purchasers for value and in good faith, except only in so far as they may be bound by the rule of *caveat emptor* as applied to purchasers at administrators' sales.

The principal question here presented is, Did Charles D. Sweeney, by his deed of January, 1896, to respondents, convey his entire title and interest in lots 19 and 20, or did he by that deed convey only an undivided one-half interest therein? This problem is to be solved by the language of the description of the interest conveyed by that deed, which, however, if ambiguous may be aided by the then situation of the parties thereto, the attending circumstances, and evidence of any construction which the parties themselves put

upon the language of the description; such extrinsic matters, however, to be considered in aid of such ambiguous description only in so far as appellant was bound to take notice of such extrinsic matters at the time of acquiring this deed in 1905. It is insisted by counsel for appellant that the words "his one-half undivided interest," as used in the description in the deed from Sweeney to respondent which we have above quoted, had reference to all of the lots there specified, and hence that only an undivided one-half of lots 19 and 20 passed to respondents by that conveyance; while counsel for respondents insist that such words had reference only to the lots 1, 2, 3 and 4; and that therefore the whole of the lots 19 and 20 passed to them by that conveyance.

Counsel for appellant invoke the general rule as stated in 13 Cyc. 638, as follows:

"Where a deed conveys a moiety or undivided part of a piece of land and then proceeds with a description of other land without express words showing an intention to convey all the latter described land, the words of limitation used in describing the first-mentioned parcel will be construed as also applying to the latter."

While this seems to be a fair statement of the law in general terms upon this subject, the decided cases have dealt with facts so varying as to suggest caution in applying the rule without careful consideration of the particular language of the description involved. Among the decisions coming to our notice which lend support to appellant's contentions, the following are most worthy of notice: In the early case of *Hapgood v. Whitman*, 13 Mass. 464, decided in 1816, there was involved a description in a conveyance much like that here involved. Both the facts involved and the conclusion reached in that case will be best understood by quoting therefrom as follows:

"The action was submitted to the decision of the court on a case agreed by the parties, in which the whole question was, whether by a certain deed, a copy of which was in the case,

the tenant took the whole, or a moiety only, of the land in question. By that deed, the tenant's father, in consideration of the love and affection he bore to his said son, and his desire to see him comfortably settled in the world, granted to him in fee 'the one-half of the land hereafter described, both in quantity and quality, one-half of all the land contained within the bounds hereafter mentioned, namely, beginning,' etc. (particularly reciting the boundary lines), 'the one-half of the whole of said land, and one-half of the buildings on the same, except the dwelling house; *and also* one other piece of land, being meadow and upland, containing seven acres, more or less, and bounded as follows, namely, beginning,' &c; the last-described piece being the land in question. . . .

"The words, *one-half of the land hereafter described, and one-half of all the land contained within the bounds hereafter mentioned*, necessarily apply to the land which is the subject of this suit; although these words are not repeated in that part of the deed which conveyed this particular lot. The terms *and also*, which introduce the description of the land in question, show that the same portion of the land was intended to be granted as of that described in the preceding part."

The words "and also" as there used, connecting the descriptions of the tracts involved, are substantially of the same import as the word "and" used in the description here involved, connecting the designation of lots 19 and 20 with the prior designation of lots 1, 2, 3 and 4. Indeed, in this case the descriptions seem to be even more closely related, because here all of the lots are designated in a single clause without any punctuation whatever, while in the *Hapgood* case the words "and also" were preceded by a semicolon. In the case of *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400, dealing with a situation not unlike this, the court said:

"The description of the estate conveyed by the deed from Abner to George Knight, is 'one undivided moiety or half part of a certain lot or tract of land situate in Northport aforesaid, and butted and bounded as follows, viz.:' it then proceeds with a particular recital of the metes and bounds of the lot, and concludes with these words, 'containing fifty-

two acres and eighty rods and no more, and including the salmon fishery contiguous to said land.' Was the fishery included in the lot, half of which was conveyed, or included in the conveyance as a distinct portion of property? There is no indication of an intention to convey two distinct pieces of property, the one being an undivided half of the lot, and the other the entire salmon fishery. The grammatical arrangement of the language is opposed to such a construction, and is suited to convey an undivided half of the fishery as a right appertaining to the lot. The word *containing* is clearly connected with the word *lot*, or *tract*, as its substantive, showing, that the whole lot contained a certain number of acres and rods. The word *including* is coupled to it, and must have the same antecedent, showing, that the lot included the fishery. No other construction can be admitted without doing great violence to the language."

In *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511, there was involved a description of an "undivided half" of a parcel of land "and also" another parcel. The court held that the interest conveyed in the second parcel was limited by the words "undivided half," as well as the interest conveyed in the first parcel.

The following decisions are cited and relied upon by counsel for appellant. In *Child v. Wells*, 13 Pick. 121, the court recognized the principle upon which the above noticed cases were decided, though the particular facts there involved called for a different decision. The question was disposed of in the following language:

"The deed purports to convey an undivided moiety of a tract (described), also one other tract of land (described), also an undivided moiety of a third and fourth tracts (described). The controversy is in regard to the second parcel only. The argument presents two questions: 1. Whether by a fair construction of the deed, the whole or a moiety of the second parcel was conveyed. . . . Where a deed contains a description of a moiety of one tract of land, and then goes on to describe another parcel, beginning with the word 'also,' this affords some ground to infer that the force and effect of this word was intended to extend to the word moiety,

as a qualification of the other descriptive words, and if there were nothing to control it, and such construction should appear consistent with the general intent of the deed, it might be reasonable to adopt it. This construction would be a little helped, if it should be, 'also one *other* tract,' the word 'other' indicating some connection between the first and second parcels. But in the deed under consideration, there are two other parcels, the descriptions of which, in both cases, begin like the first, with the words 'one half of undivided tract' etc. Taking the whole together then, it conveys to the grantee and his assigns, 1. One half of an undivided tract of land lying, etc. 2. Also a tract of land lying, etc. 3. Also one half of undivided tract of woodland, etc. 4. Also one half undivided tract or parcel of land lying, etc.

"The writer of the deed was obviously illiterate and unskilful; but making every allowance for this, it is impossible, we think, to put any construction upon the language, which will limit the conveyance of the second parcel to a moiety. We are of opinion that the whole of the second parcel passed by this deed."

While this decision is cited and relied upon by counsel for respondents, we think it lends greater support to appellant's contentions in view of the language here involved. In *Hodges v. Thayer*, 110 Mass. 286, there was involved a description reading "all those tracts or parcels of land situate, lying and being . . . to wit: one equal and undivided one-half part of . . . ;" Then follow descriptions of several other tracts by clauses separated from each other by semicolons. Construing these descriptions, the court said:

" 'All those tracts or parcels of land situate,' &c., 'described as follows.' The first particular description is of 'one equal and undivided one half part' of certain tracts, defined by number of township, range, section and lot, or fraction of section, indicated by points of compass. Then, after a semicolon, the description proceeds, 'also, lots three and four,' &c. The fact that the statement of the undivided half interest is contained only in one of the clauses of particular description, and that the whole is preceded with the general phrase, 'All those tracts or parcels,' indicates that the statement of partial interest was not also appli-

cable to all the tracts contained in the deed; or, to state it differently, the absence of the qualifying words, in the general terms of the description, indicates that they were not applicable generally to all the tracts."

This decision we think comes nearer lending support to the contention of counsel for respondents than any other coming to our notice. It is to be noticed, however, that each description involved was by a clause separated from the others by a semicolon. In *Michon v. Ayalla*, 84 Tex. 685, 19 S. W. 878, there was involved a description which seemed to convey an undivided interest only, but was followed by the words: "To have and to hold my entire interest in and to the foregoing described property." This was held to convey the grantor's entire interest in the property though apparently she then had a greater interest than the undivided interest which was so designated. In *Murphy v. Murphy*, 132 N. C. 360, 43 S. E. 922, and *McLennen v. McDonnell*, 78 Cal. 273, 20 Pac. 566, we find situations much like this where the same conclusions were reached. The decision in *Witt v. Harlan*, 66 Tex. 660, 2 S. W. 41, is of some interest in connection with this question, though we regard it as of but little aid here.

Some contention is made by counsel for respondents, rested upon the fact that the description in the conveyance made by Charles D. Sweeney to respondents in 1896 commenced with the word "*his*," and the fact that at that time he had an undivided half interest in lots 1, 2, 3 and 4, and had the entire title to lots 19 and 20. There might be some basis for this fact having some influence in our decision here, if appellant at the time of acquiring this deed, had been required to take notice of the fact that Charles D. Sweeney had only an undivided half interest in lots 1, 2, 3 and 4; but we think appellant was not required to take notice of any such fact. Sweeney's one-half interest in those lots would not have been disclosed by an examination of his title to lots 19 and 20. That deed would not have appeared upon an ab-

stract of title to lot 19 or 20. It seems to us that the words "his half undivided interest," as used in the deed, would not suggest to a prospective purchaser of the other undivided half that that expression had reference only to lots 1, 2, 3 and 4 in that deed.

It appears that from the years 1896 to 1904, inclusive, the taxes upon lots 19 and 20 were paid by respondents. It may be suggested, though it is not plain from the briefs that it is so contended, that this is a circumstance pointing to a construction of the deed by the parties indicating a conveyance of the whole of lots 19 and 20 to respondents by Charles D. Sweeney. We think that in any event this was not a circumstance which appellant was bound to take notice of; and even if it were, the payment of taxes upon an entire tract of land by one of two joint owners is no evidence to a stranger that the one so paying the taxes claims title to the whole, nor that his co-owner is acquiescing in such claim. Such payment of taxes simply inures to the benefit of both. 38 Cyc. 50. It does appear that, from the time of acquiring its deed in 1905, until the commencement of this action in 1909, appellant paid all of the taxes upon its claimed undivided half interest, and also paid several hundred dollars additional upon local improvement assessments made by the city of Everett.

Counsel for respondents insist upon the rule of strict construction against the grantor. If we were of the opinion that this description was so ambiguous as to call for extrinsic aid in determining its meaning, and all other rules of construction had failed in furnishing us aid as to its true meaning, it is possible we might resort to the rule of strict construction as against the grantor. That rule has practical application where possession is taken under the deed, and also as applied to covenants, conditions, and limitations in a deed; but we apprehend it should be applied with caution when it comes to construing the language of the description

of the property embodied in the deed. In the text of 13 Cyc. 609, it is said:

"In case of ambiguity in a deed, or where it admits of two constructions, it will be construed most strongly against the grantor, or most favorably to the grantee. This rule is subservient to the ascertained intention of the parties, and is to be modified by the rule requiring effect to be given every word so far as possible; nor is it to be applied or invoked until all other rules of construction fail. It is also declared to be of doubtful propriety, its value seriously affected, and it has even been said that it has no application at the present time."

Counsel for respondents invoke the rule of *caveat emptor* as applied to sales by administrators, citing *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. 936, and *Matson v. Johnson*, 48 Wash. 256, 93 Pac. 324, 125 Am. St. 924. In the *Towner* case, the doctrine was applied only to the extent of requiring the purchaser to take notice of the want of power of an administrator to sell certain kind of property of the deceased for the benefit of creditors, and in the *Matson* case the court said, at page 259: "The rule of *caveat emptor* applies in all its vigor to sales by administrators or executors in this state, and the purchaser acquires only the interest of the estate;" thus recognizing that the doctrine does not go to the extent of requiring such a purchaser to look beyond the actual interest or title of the deceased at the time of his death, and the power to sell the particular property involved in the administration. We know of no law that does not permit the purchaser at an administrator's sale to rely upon the title of the deceased at the time of his death as shown by the records of the county where the land lies, when such land is unoccupied as in this case, and no rights of minors or incompetent persons are involved, to the same extent any purchaser may so rely. In the text of 39 Cyc. 1741, it is said:

"It is the policy of the law that all matters affecting the title to land shall be placed on record, and, where an intend-

ing purchaser finds nothing on record to indicate an adverse claim, and has no notice of any facts sufficient to put him on inquiry as to matters not of record, he has the right to presume that there is no adverse claim."

Our decisions are in harmony with this view. *White v. McSorley*, 47 Wash. 18, 91 Pac. 243; *McDougall v. Murray*, 57 Wash. 76, 106 Pac. 490, 26 L. R. A. (N. S.) 159; *Eyanson v. Waidlich*, 57 Wash. 234, 106 Pac. 746.

We are of the opinion that, when appellant acquired its deed to the undivided half interest in lots 19 and 20, in June, 1905, it was entitled to rely solely upon the language of the description of the deed from Charles D. Sweeney to respondents, of January, 1896; and in view of the fact that all of the designated lots of that description following the words "his one half undivided interest" are in one clause, without any punctuation whatever, we conclude that by that conveyance Charles D. Sweeney did not part with more than an undivided half interest in lots 19 and 20, and that he died possessed of the title to the other undivided half interest therein; hence, that undivided half interest passed by the deed of his administrator and by mesne conveyance to appellant.

We conclude that respondents were not entitled to have title quieted in them as against the claim of appellant to an undivided half interest in lots 19 and 20.

The judgment is reversed, with directions to the trial court to dismiss the action.

Crow, C. J., Mount, and Chadwick, JJ., concur.

Gose, J. (dissenting)—I think the two deeds, when read together, fortified by the conduct of the parties during the lifetime of the grantor, show a clear intention to convey the entire fee of the property in controversy. I therefore dissent.

[No. 10527. Department One. January 21, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Gentlo Fugita, Appellant*, v. R. B. MILROY, *as Police Judge of North Yakima, Respondent*.[1]

COURTS—CREATION—JURISDICTION—LARCENY. Under Const., art. 4, § 1, vesting judicial power in certain courts, and such inferior courts as the legislature may provide, and art. 4, § 12, providing that the legislature shall prescribe the jurisdiction and powers of such inferior courts, the legislature had power by Rem. & Bal. Code, § 7656, to create police courts in cities of the second class, and by § 7657, to confer on them jurisdiction of petit larceny committed within the city.

CRIMINAL LAW—JURISDICTION—CHANGE OF PENALTY—LARCENY—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 7657, expressly conferring on police courts jurisdiction of petit larceny committed in the city, and limiting the jurisdiction in the case of misdemeanors to those punishable by fine not exceeding $500, or by imprisonment not exceeding six months, does not oust the court of jurisdiction in the case of petit larceny upon a subsequent change of penalty.

STATUTES—TITLES AND SUBJECTS—SCOPE. An act entitled an act for the "government of municipal corporations" is broad enough to include provisions creating a police court and conferring jurisdiction thereon of prosecutions for petit larceny committed within the city.

JURY—RIGHT TO JURY TRIAL—VENIRE—BODY OF COUNTY. A venire to summon a jury in a police court "from the body of your city" violates Const., art. 1, § 22, guaranteeing the right of trial by an impartial jury of the county; and since Rem. & Bal. Code, §§ 679, 1762, and 7665, empowers police officers of a city to serve all processes from the police court in any part of the county, such a venire is not authorized by Id., § 69, conferring on a court all the means necessary to carry into effect jurisdiction conferred upon it.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered January 5, 1912, dismissing a writ of certiorari to review a judgment of a police court, after a hearing before the court. Reversed.

Floyd Hatfield and *H. J. Snively*, for appellant.

Guy O. Shumate, for respondent.

[1]Reported in 129 Pac. 384.

Gose, J.—This is an appeal from a judgment entered by the superior court of Yakima county, dismissing a writ of certiorari. The writ was sued out by the appellant, and directed to the police judge of the city of North Yakima, to review a judgment of the police court of that city. It was based upon the following facts: On the 21st day of December, 1911, a complaint was filed in the police court of the city of North Yakima, wherein the state was the plaintiff and the appellant the defendant, charging the appellant with having committed the crime of petit larceny on the 17th day of December, 1911, "within the corporate limits of the city of North Yakima." The appellant was arrested, appeared in court in person and by counsel, and demanded a jury of twelve persons to try the cause. The police judge thereafter issued a special venire, directed to the chief of police or any policeman of the city of North Yakima, commanding him to summon "sixteen good and lawful men" "from the body of your city," to be and appear in the police court of said city upon a day fixed, to act as trial jurors in the case. Upon the return of the venire, a jury was empaneled and the cause was tried, resulting in a verdict of guilty. A judgment was thereafter entered upon the verdict. The appellant made timely objection to the jurisdiction of the court. He also entered an objection to the jury empaneled, on the ground that there was no authority for such a jury or for the venire, that the jurors were not selected from the proper body of citizens or taxpayers, and that the officer who served the venire acted without legal authority.

The points specially pressed here are, (1) that the police court of the city of North Yakima was without jurisdiction of the person of the appellant or of the crime charged; and (2) that the jury was selected and empaneled without authority of law. The city of North Yakima, theretofore a city of the second class, had adopted a commission form of government under the provisions of Laws of 1911, page 521, at the time the crime was charged to have been committed.

A consideration of these questions requires a reference to the constitution and the statutes. The provisions of the constitution applicable to the first contention are as follows:

"The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." Art. 4, § 1.

"The legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this constitution." Art. 4. § 12.

On March 27, 1890 (Laws of 1889-90, page 131), the legislature passed an act entitled:

"An Act providing for the organization, classification, incorporation and government of municipal corporations, and declaring an emergency."

This act, § 92 (Rem. & Bal. Code, § 7656), established a police court for cities of the second class; § 93 (Rem. & Bal. Code, § 7657), provides, among other things, that the police court of such city shall have jurisdiction of "petit larceny" "committed within such city," and certain other enumerated offenses, "and all misdemeanors punishable by fine not exceeding $500, or by imprisonment not exceeding six months, or by both such fine and imprisonment." This section provides further:

"(10). The police court shall have exclusive jurisdiction of all proceedings mentioned in this section, and no justice of the peace in such city shall have power to try and decide any cases of the classes mentioned in said section."

Section 94 (Rem. & Bal. Code, § 7658), provides that "The defendant shall be entitled, if demanded by him, to a jury trial." Section 95 (Rem. & Bal. Code, § 7660), provides for appeals to the superior court. Laws 1907, page 623, § 2 (Rem. & Bal. Code, § 7585), provides that the officers of cities of the second class shall include a police judge. Rem. & Bal. Code, § 7591, provides for the appointment of a police judge. The act providing for a commission form of government (Laws 1911, page 521), makes no express

provision for a police court or a police judge. Section 4 of the act, however, provides:

"All existing laws governing cities of the second class or applicable thereto, not inconsistent with the provisions of this act, shall apply to and govern cities organized under this act."

The constitutional provisions quoted make it as plain as human language can express a thought that the legislature may provide for "inferior courts" and prescribe their "jurisdiction and powers." In commenting upon these clauses in that instrument, this court said, in *In re Cloherty*, 2 Wash. 137, 27 Pac. 1064:

"But to the legislature of the state the constitution delegates authority to transfer from one of the constitutional courts to another certain limited portions of the judicial power; and it may also provide new, inferior courts, not specifically mentioned in the constitution, to which may be assigned such part of the inferior judicial power as it may deem wise to transfer. The natural conclusion from this premise would be that a court for the administration of municipal ordinances must have been created by an act of the legislature."

The only limitation upon the power of the legislature is that the courts established by it shall be, in fact and in law, inferior courts. It is equally plain that the legislature has established police courts in cities of the second class, made them inferior courts, and given them jurisdiction *eo nomine* of the crime of petit larceny when committed within the city. This was within its constitutional powers. Dillon, Municipal Corporations (5th ed.), § 744. Jurisdiction was given over a particular crime by name, and a subsequent change of penalty does not, as argued, oust the court of jurisdiction. *State v. Gleason*, 15 Wash. 509, 46 Pac. 1043. The intention of the legislature is apparent. The statute gives the police courts exclusive jurisdiction of certain crimes by name, whilst its jurisdiction of other offenses is limited to cases

where the fine does not exceed $500, or the term of imprisonment does not exceed six months.

The further contention is made that the title of the act is not broad enough to embrace offenses against the state. It provides for the "government of municipal corporations." It is argued that the act is limited by its title to the government of the city. Legitimately extended, the argument means that the body of the act is two-fold: (1) that it confers power to exercise municipal functions; and (2) that it confers power to execute the laws of the state for offenses committed within the corporate limits. If the argument is sound, and the title of the act had expressly provided for a police court empowered to execute such state laws, the title would have been subject to the vice that it contained more than one subject, and hence violative of § 19, art. 2, of the constitution. The title, we think, is sufficiently comprehensive. It can hardly be doubted that the execution of the laws of the state within the municipality pertains in the broadest sense to municipal government. City government in the highest sense means an enforcement of the law within its limits, for without law and order there can be no real government.

There remains for consideration the contention that the appellant was denied the right of trial "by an impartial jury of the county in which the offense is alleged to have been committed," as guaranteed by art. 1, § 22, of the constitution. As we have seen, the venire commanded the officer to summon the jury "from the body of your city." The act of 1889-90, p. 177, § 101 (Rem. & Bal. Code, § 7665), empowers the chief of police or any policeman of said city to serve, execute, and return all warrants of arrest and all processes directed to him by the police judge, "and to do and perform all acts and duties which in criminal cases any constable of the county may lawfully do." This would seem to authorize such officer to serve a venire in any part of the county wherein the crime

is alleged to have been committed, where a violation of a state statute is charged. Rem. & Bal. Code, §§ 679, 1762. This question, however, we do not decide. In *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355, we held that the jury law of 1909 was valid. It provides that each county shall be divided into jury districts; that the name of each qualified juror shall be deposited in the jury box of the district wherein he resides; and that in calling a jury, the names shall be drawn in equal numbers from each jury box. We said, in answer to the charge that the act was unconstitutional: "The law in question does not attempt to provide for a jury from any division or district less than the whole county." In the case at bar, the venire was especially restricted to a definite part of the county. We think the plain intent of the words "jury of the county" is that the defendant is entitled to have the venire extended to the body of the county, and that it may not be restricted to a less unit; at least, without express legislative sanction. *State ex rel. Lytle v. Superior Court*, 54 Wash. 378, 103 Pac. 464. If it may be restricted to the municipality without the sanction of the legislature, at the caprice of the police judge, we can see no reason why he might not continue the restriction to a precinct or a ward. It would seem that the words "jury of the county" mean a jury of the whole county, and not a jury of some particular part of the county.

The respondent argues that the venire in question was warranted by the provisions of Rem. & Bal. Code, § 69, which provides that, when jurisdiction is, by the constitution or the statute, conferred on a court or judicial officer, all the means to carry it into effect are included; and in the exercise of jurisdiction, if the procedure be not specifically provided, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the code. We do not think this section is susceptible of such construction.

We are of the opinion that the jury was illegally drawn,

and the judgment is reversed, with directions to enter a judgment sustaining the writ.

Crow, C. J., Chadwick, Parker, and Mount, JJ., concur.

[No. 10582. Department One. January 21, 1913.]

O. Yamaoka, *Respondent*, v. J. S. Kloeber, *Appellant*.[1]

Sales—Breach by Seller—Damages—Measure. Where pedigreed breeding stock was sold for export to Japan on the representation that it was registered and under an agreement to deliver registration certificates, with full knowledge of the market conditions in Japan, where the expense of marketing them was great and without the certificates the stock was valuable only as beef, the measure of damages is the difference between the value of the stock in Japan as contracted for and the value without the certificates; and damages in a large sum based upon reasonably certain evidence will be upheld as reasonably within the contemplation of the parties.

Sales—Breach of Seller—Defenses. A seller of pedigreed stock, who agreed to furnish certificates of registration, cannot escape liability for breach of the agreement by asserting that he was only a broker.

Damages—Breach by Seller—Mitigation of Damages. A purchaser of pedigreed stock, under an agreement whereby the seller was to furnish certificates of registration, is not bound to mitigate the damages by procuring the certificates, where the information necessary for an application for registration was in the exclusive possession of the seller.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 30, 1912, upon findings favorable to the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Preston & Thorgrimson, for appellant.

Shank & Smith, for respondent.

Gose, J.—This is an action to recover damages, arising from the failure of the defendant to furnish the plaintiff

[1]Reported in 129 Pac. 387.

with certificates of registration and transfer for one Holstein-Friesian bull and four bull calves of the same breeding. The complaint alleges that the animals were sold to the plaintiff by the defendant, to be shipped and sold in Japan, and that the defendant agreed with the plaintiff, at the time of making the sale, that he would at once cause the animals to be registered and forward the certificates of registration and transfer to the plaintiff, and that he failed so to do. The court found against the plaintiff upon the issue as to the old bull, and found for him upon the issues as to the four bull calves, and a judgment was entered accordingly. The defendant prosecutes the appeal.

The court found that the appellant failed and neglected to furnish the certificates, despite the repeated demands and his repeated promises to furnish them; that with the certificates of registration the young bulls would have had a market value in Japan of $2,000, but without the certificates they had a value of only $100, and were salable in that market only as beef. In a memorandum opinion, which was reaffirmed in the findings, the court found that the appellant knew that the respondent was purchasing the calves for exportation and sale in Japan. These findings are supported by a preponderance of the evidence. On October 11, 1907, after the sale of the old bull and prior to the sale of the bull calves, the appellant wrote the respondent:

"I wish to . . . express my appreciation of the visit of two of your representatives to see my herd of Holstein-Friesians. I showed them some young stock of excellent quality, stock that could not be duplicated in this part of the country at anything like the price I made, and which I made particularly because I foresee a large business with Japan in the dairy industry and was particularly desirous of having my herd represented amongst the herds of your country."

On March 24, 1908, he wrote:

"I am very glad indeed that you are pleased with your purchase, and will assure you of my very great appreciation

of your business in the past and hope that you will favor me with your future patronage for exportation."

Again, on March 30, the date the cattle were shipped from Seattle, he wrote:

"I think you have made a good choice of stock for exportation. All of the animals you are taking with you are representatives of the best families of the Holstein-Friesian breed, and belong to the hardy, strong branches, not the closely inbred and smaller ones that you find in some parts of the East. I think that your country is to be congratulated on having this kind of stock introduced into it as a foundation stock, and I hope we shall be able to [do] a great deal more business along this line with you. . . . The papers of transfer and registration will be here inside of a few weeks and will be forwarded to you."

The respondent paid $575 for the four calves, and received from the appellant a guaranty that he would procure and forward certificates of registration and transfer. Demands for these certificates were made from time to time for a year and a half after the calves were shipped to Japan, and the appellant's promises to comply were iterated and reiterated, but never kept. In these demands the appellant was repeatedly advised that the calves could not be sold in Japan without the registration certificates, a fact which he as a breeder of such cattle must be presumed to have known. The appellant testified that he had been engaged for a number of years in breeding and selling pure bred Holstein-Friesian cattle, and that he was a member of the Holstein-Friesian Association of America, and "very thoroughly" familiar with its rules and regulations. As a breeder of pure bred cattle, he knew that certificates of registration are the only accepted evidence of their breeding in the market. This is a general rule.

The appellant strenuously insists that the damages allowed by the court are unreasonable and based upon uncertain evidence, and argues that the appellant was ignorant of the market value of such cattle in Japan, and that he did not

know that in that market such cattle, unaided by certificates of registration, had no value except as beef. The vice of the argument is that the appellant testified that he was familiar with market conditions in Japan. Nor was the evidence of the market value uncertain. The shipment comprised thirty head of Holstein-Friesian cattle, made up apparently of twenty-five cows and heifers, one bull four years old, and the four bull calves in controversy. The respondent had the registration certificates for the twenty-five head, and testified that he sold them in Japan, and that he was familiar with the market value of such cattle there. The appellant did not controvert their market value. It is argued that, despite that fact, the court was not required to believe the respondent's testimony. That may be conceded, but the court did believe it, and there is nothing either unreasonable or inherently improbable in his testimony. Respecting the rule of damages in such cases, in *Miller v. Mosely* (Tex. Civ. App.), 91 S. W. 649, it was held that, where one person sells cattle to another, representing them to be registered, and agrees to deliver registration certificates and fails to do so, the measure of damages "is fixed at the difference between the value of the cattle delivered without registration papers and their value had they been properly registered." The general rule is that, where one contracts to deliver an article of a particular kind or quality and delivers an inferior article, the measure of damages is the difference between the value of the article contracted for and the value of the article delivered. *Seaboard Lumber Co. v. Cornelia Planing Mill Co.*, 122 Ga. 370, 50 S. E. 121; *Missouri & Illinois Coal Co. v. Consolidated Coal Co.*, 127 Mo. App. 320, 105 S. W. 682; *Sloan v. Allegheny Co.*, 91 Md. 501, 46 Atl. 1003; *Deutsch v. Pratt*, 149 Mass. 415, 21 N. E. 1072; *St. Anthony Lumber Co. v. Bardwell-Robinson Co.*, 60 Minn. 199, 62 N. W. 274; *Fargo Gas & Coke Co. v. Fargo Gas & Elec. Co.*, 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593; *Bump v. Cooper*, 19 Ore. 81, 23 Pac. 806; *Brock v.*

Clark, 60 Vt. 551, 15 Atl. 175; *Florence Oil & Ref. Co. v. Farrar*, 119 Fed. 150. "Damages, in legal acceptation, mean compensation for the loss suffered or the injury sustained." *Jones v. Nelson*, 61 Wash. 167, 112 Pac. 88.

We held in *Sedro Veneer Co. v. Kwapil*, 62 Wash. 385, 113 Pac. 1100, that where a manufacturer of lumber products sold egg case shooks to a jobber who he knew was buying to resell in the market, but who had no existing contracts, and failed to deliver, the measure of damages was the profits lost by the purchaser upon sales which he subsequently negotiated. In *Kleeb v. McInturff*, 62 Wash. 508, 114 Pac. 184, 116 Pac. 627, we held that, where a stallion was sold upon the representation that he was registered, upon a promise to furnish a registration certificate, and the horse was neither registered nor eligible to registration, the measure of damages was the difference between the price paid and the actual value of the horse at the time of purchase. These cases illustrate the principles which underlie an allowance of damages for a breach of contract. It is true, as argued, that the evidence of the amount of damages sustained must be reasonably certain, and that damages may not rest upon speculation or conjecture. While the damages are large, we cannot say that the amount awarded is unreasonable, or that it was not reasonably within the contemplation of the parties. As the learned trial court observed in his memorandum opinion:

"This is one of those contracts where profits alone were contemplated. Plaintiff bought the calves to resell in the high market of Japan. The things that evidenced or gave them their value in that market and which were to be furnished, were the necessary certificates. The two articles are to go and to be considered together. The calves are but one part, the certificates the other part. The certificates without the calves are worthless. The calves without the certificates are comparatively worthless as selling commodities in that market."

In principle there is no difference between this case and

a case where there has been a sale of a good article and a delivery of a defective, inferior, or incomplete article. The appellant represented that the calves were strongly bred in the best families of the breed. The expense of marketing them in Japan was large, a fact which he as a breeder for the market will be presumed to have known. He also knew that the value of a strongly-bred young bull of individual excellence is largely a matter of personal fancy, and that a price that will stagger one buyer will not deter another.

The animals were four years old at the time of the trial (May, 1911), and the respondent testified that the certificates then tendered were of no value because of the age of the animals, and because of certain unfriendly newspaper comment upon his representing the animals to be pure bred when he did not have the evidence of their breeding, and because of the plague among cattle in that country.

The contention that the appellant acted only as a broker in the sale of one of the calves, and hence is not liable in damages, is not tenable. The evidence supports the finding of the court that he agreed to furnish a certificate of registration for him and failed so to do. The contract of sale and guaranty is as follows:

"Seattle, Wash., 2-17, 1908.

"Received of Mr. Yamaoka (The Oriental Trading Co.) the sum of $2875.00 for the following Registered Holstein Cattle as follows:—

4	Head yearlings at 200.00	800.00
6	" 2 yr. old, at 250.00	1500.00
*2	" Calf Bulls at 200	400.
		2700.00
All in car at N. P. Stock Yard freight paid		
*1 Calf Bull	Express from	100.00
*1 " "	Hot Springs	75.00
		$2875.00

"The same to be Registered & Transferred to O. Yamaoka on the books of the Holstein Friesian Breeders of America.
"Signed J. S. Kloeber."

The stars indicate the calves which form the basis of this controversy. It is argued that it was the duty of the respondent to mitigate the damages by personally procuring the certificates. The appellant testified that one applying to register a Holstein-Friesian calf was required to tender to the association an application signed by the owner of the sire at the date of service, by the owner of the dam at the date of its birth, and by the owner of the calf at the time the application was made. The application must also give the name and registered number of both the sire and the dam. The respondent did not have this information. The appellant had it, but did not use it.

The judgment is affirmed.

CROW, C. J., MOUNT, PARKER, and CHADWICK, JJ., concur.

[No. 10546. Department One. January 22, 1913.]

M. J. SHEERAN, *Respondent*, v. FORD GRAIN COMPANY, *Appellant*.[1]

BROKERS—CONTRACT FOR COMMISSIONS—PERFORMANCE—VIOLATION OF INSTRUCTIONS. A broker authorized to purchase wheat at 75 cents per bushel net at warehouse, which gave the purchaser control of the shipping, did not perform his contract, where he purchased it at 78 cents, f. o. b., which gave the seller control of the shipping; especially where he reported the sales at "75 cents net to the farmer," when the warehouse charges were only 1½ cents; and where he purchased certain wheat on his own responsibility at a price three cents per bushel in excess of the authorized price.

SAME—ACTIONS FOR COMMISSIONS—OFFSET OF DAMAGES BY VIOLATION OF INSTRUCTIONS. In such a case, where the broker was instructed to return and get the price reduced according to instructions, which he was unable to do, whereupon the purchaser secured a cancellation of the contracts and accepted the wheat at 77 cents,

[1]Reported in 129 Pac. 378.

f. o. b., the same was in the nature of a compromise, and in an action by the broker for commissions, the purchaser is entitled to offset its damages by reason of the excess price paid and its expenses.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered February 19, 1912, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Modified.

Tolman & King, for appellant.

Canton & Hensel, for respondent.

Gose, J.—This is an action to recover an alleged stipulated commission on wheat purchased by the plaintiff for the defendant during the grain season of 1911. The court found that, in August, 1911, the plaintiff purchased 7,000 bushels of wheat for the defendant at an agreed compensation of $15, and that on the 9th day of September following, he purchased 53,500 bushels of wheat for it at an agreed commission of one cent a bushel, and a judgment was entered in favor of the plaintiff for $550. The defendant prosecutes an appeal. There is no controversy over the August purchase.

The respondent testified that he was instructed to purchase No. 1 blue stem wheat upon warehouse receipts, at seventy-five cents per bushel net; that he purchased 28,500 bushels of that kind and grade of wheat from the Waterville Union Grain Company at seventy-eight cents a bushel f. o. b.; that he obligated the appellant to purchase from it 22,000 bushels of the same kind of wheat at the same price; and that he purchased from it 3,000 bushels of Jones' Fife at seventy-five cents per bushel f. o. b. He further testified that he reported the purchases by telephone "at seventy-five c. net to the farmer;" that he did not report that he had paid seventy-eight cents f. o. b., and that he purchased the 3,000 bushels of Jones' Fife without instructions and upon

his own responsibility. The testimony shows that the warehouse charges on wheat at the place of purchase were one and one-half cents a bushel up to January 1, and that the remaining one and one-half cents was the "working margin" of the warehouse company in excess of its handling charges.

A few days after the respondent had made these purchases, he went to the Spokane office of the appellant, submitted his written confirmations, and the appellant told him that it would not accept the wheat at those prices, and directed him to return and get the price reduced to the level of his authorization. The respondent was unsuccessful in his efforts to get a reduction. He made the purchases on the 9th day of September, and on the 15th the appellant, through one of its salaried employees, secured a cancellation of the contracts and accepted the wheat at seventy-seven cents f. o. b. for the blue stem and seventy-four cents f. o. b. for the Fife.

The respondent neither purchased the wheat nor reported it according to his instructions. He first advised by telephone that he could get the wheat at seventy-five cents per bushel net to the farmer, and later reported that he had so purchased it. That spirit of candor and fairness which the law exacts of an agent imperatively required him to observe his instructions and report the truth. His method of avoidance was both unfair and misleading. He seeks to justify his conduct by saying that the appellant knew the warehouse charges. This may be true, but the straight charges were only one and one-half cents a bushel. It was the respondent's duty to report the facts as they actually were, and this he did not do. He was instructed to buy upon warehouse receipts so that the appellant could direct the time of shipment. He purchased of the warehouseman without a warehouse receipt, thus giving the seller the control of the shipping. Moreover, he paid seventy-five cents a bushel for the Fife, a price, according to the testimony, three cents in excess of its value.

The appellant treats the cancellation of the old contracts and the execution of the new contracts as a purchase. But we regard it more in the nature of an adjustment or a compromise. The appellant is entitled to offset its damage as against the respondent's commission. Its damages are, expense of settlement, $50; two cents a bushel on 3,000 bushels of Fife, $60; one-half a cent a bushel on 50,500 bushels of blue stem, $252.50, making in the aggregate $362.50. The respondent is entitled to a commission of one cent a bushel on 50,500 bushels of blue stem, or $505; commission on the August purchase, $15; total, $520, less the appellant's damages, $362.50; leaving a balance of $157.50. He bought the Fife wheat on his own responsibility, and is not entitled to any commission.

The case will be remanded, with directions to enter a judgment for the respondent for $157.50. The appellant will recover costs of the appeal.

CROW, C. J., CHADWICK, PARKER, and MOUNT, JJ., concur.

[No. 10510. Department Two. January 22, 1913.]

ELIZABETH VAN ALSTINE, *Respondent*, v. L. W. GRAY *et al.*, *Appellants*.[1]

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS—DISMISSAL. In an action to foreclose a mortgage, dismissed without prejudice, the defendant cannot object, for the first time on appeal, that the court should have retained jurisdiction to reform the mortgage to correct a technical error.

COSTS—DISMISSAL—DISCRETION—APPEAL—REVIEW. In dismissing an action without prejudice, it is discretionary for the court to allow costs to neither party; and the ruling will not be reversed except for manifest abuse of discretion.

Appeal by defendant from a judgment of the superior court for King county, Albertson, J., entered January 16, 1912, dismissing without prejudice an action to foreclose a

[1]Reported in 129 Pac. 106.

mortgage, in which the defendant sought reformation and cancellation of the mortgage, after a trial on the merits to the court. Affirmed.

Kitt Gould, for appellants.

G. E. Steiner, for respondent.

MAIN, J.—This is an action to foreclose a mortgage upon certain real property. The complaint contains the usual allegations in such cases. Issue was joined by the filing of an answer and cross-complaint. The answer denies that the debt upon which the action is predicated is due, and for affirmative relief prays for the reformation of a deed and the cancellation of the mortgage. The action was tried to the court.

The facts, so far as germane to the questions presented to this court, are as follows: On February 23, 1907, respondents, the Van Alstines, being then the owners of lots 9 and 10, in block 92, in D. T. Denny's First addition to North Seattle, now the city of Seattle, sold and conveyed these lots to L. W. Gray. The deed of conveyance, through inadvertence, describes the property as lots 9 and 10, in block 92, in D. T. Denny's First addition to the *city of* Seattle, instead of D. T. Denny's First addition to *North* Seattle, which was the correct description. As a part of the purchase price, notes were given aggregating the sum of $13,000, with interest at six per cent per annum, payable semi-annually. These notes were secured by a mortgage upon the lots. One note for $1,000 was payable two years after date; one for $2,000, three years from date; one for $2,000, four years from date; and one for $8,000, five years from date. On the 17th day of December, 1908, L. W. Gray transferred the legal title to the lots to his brother, Clarence H. Gray. The first note for $1,000 was paid at maturity. Some days prior to the 23d day of February, 1910, when one of the notes would fall due, the

Gray brothers went to one H. A. Raser, the friend and insurance agent of the Van Alstines, and sought his assistance in securing an extension of the notes and mortgage. For this service the Gray brothers promised Raser a commission. Through the intervention of Raser, the Van Alstines agreed to the extension; and on the 21st day of February, 1910, the Gray brothers and the Van Alstines met at Raser's office, and in pursuance of the agreement for an extension of time, an indorsement was made on the back of the note maturing February 23, 1910, as follows:

"February 1st, 1910. In consideration of the increase in interest on this note from six per cent to seven per cent, and for other good and valuable consideration, the date of payment on this note is extended to February 23, 1912. This note is secured by two mortgages, one recorded in vol. U of Mortgages, page 13, Thurston county, Washington, and one in vol. 341 of Mortgages, page 39, of King county, Washington."

A similar indorsement was made on each of the other notes, except as to the date of payment. The semi-annual interest which was due and payable on the 23d day of February, 1911, was not paid. It appears from the evidence that Gray brothers paid Raser a commission of three per cent, or $360, for securing the extensions. This was without the knowledge of the Van Alstines. The trial court found that the $360, which the Gray brothers paid Raser, should be charged to the Van Alstines and applied to the payment of the interest due when the action was commenced. Applying this sum in this way, it would liquidate all interest due at the time of the institution of the action. The action was dismissed without prejudice, for the reason that it had been prematurely brought. Clarence H. Gray appeals.

The appellant's first contention is that the court, while denying the right to foreclose the mortgage, should have retained jurisdiction for the purpose of correcting the error in the description of the property in the deed from the Van

Alstines to L. W. Gray. This question is raised for the first time in this court. The appellant's counsel was present during the trial in the superior court, and heard the oral announcement of the court as to the dismissal of the action. At no time did he object to the dismissal of the action or ask the court to enter a judgment correcting the description. Indeed, at the end of the statement of facts and as a part thereof, appears in the handwriting of the trial judge a statement as follows: "It was never understood by this court that anybody but the plaintiff was objecting to the dismissal." If the appellant desired the correction as to the description in the deed, it was his duty to call this to the attention of the trial court. The matter, in any event, is technical rather than substantial. It is a matter of common knowledge that North Seattle long ago became a part of the city of Seattle. This court will not reverse cases where the error urged is purely technical, and apparently was not considered of sufficient moment to be called to the attention of the trial court.

The second contention of appellant is that the trial court should have canceled the mortgage of record and freed the property from the lien thereof, for the reason that the change in the interest rate on the notes and the extension of time of payment was made subsequent to the conveyance of the property to the appellant, and that the appellant had not consented thereto. There is no merit in this contention. The appellant was present at the time the extension was made and consented thereto.

The third contention of the appellant is that the court erred in dismissing the action without costs to either party. This was a matter within the discretion of the trial court and furnishes no basis for error, unless there was a manifest abuse of discretion, which does not appear to be the fact in this case.

The judgment will be affirmed.

MOUNT, FULLERTON, MORRIS, and ELLIS, JJ., concur.

[No. 10319. Department Two. January 22, 1913.]

ROBINSON MANUFACTURING COMPANY, *Respondent*, v. R. LEE BRADLEY *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS—PUBLIC WORK—CONTRACTOR'S BOND—LIABILITY OF SURETIES—CONDITIONS PRECEDENT—NOTICE OF CLAIM—SUFFICIENCY. Letters from a materialman to a library board, informing the board of a balance due for materials furnished a contractor, and requesting prompt payment, without any reference to the contractor's bond, do not constitute notice to the city in compliance with Rem. & Bal. Code, § 1161, providing, as a condition precedent to action on the bond, that a written notice be filed with the board that the material has been furnished and that a claim is made against the board for the amount due.

SAME. Actual notice to part of sureties would not bind the other sureties.

SAME. Such statute is not complied with by actual notice given to the sureties, at a meeting of the library board, that the bill of the materialman for material furnished the contractor had not been paid; since the statute requires written notice of a claim upon the bond.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered January 22, 1912, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a contractor's bond. Reversed.

Thomas Smith, for appellants.

Cooley & Horan and *R. Mulvihill*, for respondent.

MORRIS, J.—Action against the sureties upon the bond of the contractor, for the construction of a public library building at Anacortes. The sureties sought to evade liability because of the failure of respondent to give such notice as is required under Rem. & Bal. Code, § 1161. Findings and judgment went against the sureties, and they have appealed.

[1]Reported in 129 Pac. 382.

The only question to be considered is sufficiency of the notice. The section referred to provides that no right of action shall accrue upon bonds of this character unless within thirty days after the completion of the work the person claiming such right of action shall file with the board acting for the municipality a notice in writing to the effect that labor or material has been furnished upon such public work, and that a claim is made against the bond for the amount due. The complaint sought to bring the respondent within the terms of this statute by setting forth two letters written by respondent to the treasurer of the library board. The first of these letters is as follows:

"Everett, Wash., March 12, 1910.
"Mrs. George B. Smith, Treas. Library Board,
Anacortes, Wash.
"Dear Madam: Your favor of March 11th has been received with enclosed as stated and have passed amount to the credit of A. M. Dilling on account of library. Enclosed herewith we hand you statement showing balance due of $1,098.20. We trust that you will favor us with an early remittance covering this amount as same is now due. Yours truly, Robinson Manufacturing Co.
"By C. D. Fratt, Sec'y."

To this letter, Mrs. Smith replied, claiming an error in arriving at the balance due, upon the receipt of which respondent mailed its second letter, which is as follows:

"Everett, Wash., April 8, 1910.
"Mrs. George B. Smith, Treas. Library Board,
Anacortes, Wash.
"Dear Madam: Your favor of April 6th has been received. The statement as contained in your letter of March 14th showing balance of $858.50 on that account, is correct, and if you will send us that amount less freight expense bills we will hand you a receipt for the amount. Thanking you for a prompt response, we are, yours truly,
"Robinson Manufacturing Company,
"By C. D. Fratt, Sec'y."

At the trial respondent was permitted to amend its complaint by adding that, subsequent to the furnishing of the material, the library board held a meeting with the sureties, at which a representative of respondent was present, and that at this meeting the sureties were informed of the contractor's default, and received actual notice of the fact that respondent's bill was then due and unpaid.

We have held that the giving of this statutory notice is a condition precedent to any action upon the contractor's bond. *Huggins v. Sutherland*, 39 Wash. 552, 82 Pac. 112; *Crane Co. v. Aetna Indemnity Co.*, 43 Wash. 516, 86 Pac. 849. It has also been said that, since the primary purpose of the statute is notice, it is not required that the statute be strictly complied with, but that any form of notice which informs the municipality and the sureties that unpaid bills are due and which does not mislead either the municipality or the sureties to their injury, is sufficient. *Strandell v. Moran*, 49 Wash. 533, 95 Pac. 1106; *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158. This language, before it is accepted as authoritative, must be read in connection with the facts to which it was applied. In doing so, it will be seen that, in the *Strandell* case, notice was actually filed with the municipality that a claim was made against the bond and the sureties therein named; the only objection being that Freda Strandell, the claimant, was doing business as "A. Strandell, agent," and the notice was signed "Andrew Strandell," without adding the word "agent." This signature, under the facts, was held sufficient. In the *Cascade Lumber Co.* case, notice was also given to both the municipality and the surety. The notice failed to state that a claim was made against the bond. In discussing this point, it was said:

"But they [notices] do say that the claimant has a bill against the high school building for materials furnished to the builders to be used in the building, and the amount thereof. The notices were addressed to the surety company,

and served upon it. These notices were the *substance* of the notice provided for by the statute. When it was addressed to and served upon the surety, that company must have known that the notice was given to them solely by reason of the bond, and that the claimants meant thereby to claim against the bond."

Tested by this language it cannot be said that either one of these letters, or both of them combined, complied with, or attempted to comply with, the substance of the statutory notice. The utmost that can be claimed for them is that they inform the library board of the balance due from the contractor. There is no attempt to file a claim against either the building or the bond. The purpose is apparent—to request an early payment of the balance claimed from the library board—without any reference to the bond or the obligations of the sureties thereunder. Respondent had in mind nothing more than the usual correspondence accompanying a bill for an unpaid balance. The letters contain no recognition of any statutory requirement, nor any attempt to comply therewith. To hold these letters sufficient as a notice would be to say that, whenever any creditor of a contractor upon public buildings writes a letter notifying the municipality of the amount due him for labor or materials furnished in the construction of such a building, a liability can, because thereof, be enforced against the sureties upon the contractor's bond. The statute requires something more than this, and it cannot be held that its requirements have been substantially met, conceding that to be all that is required, until there has been an attempt in some form to recognize the demand of the statute and to obtain rights thereunder, which otherwise would not exist. We therefore hold that these letters cannot avail respondent as a compliance with our statute.

The next question is, was the meeting notice? The record discloses that four sureties, with their wives, signed the bond. Three of these sureties only were present at this

meeting, and none of the wives. Under these circumstances it surely could not be, as found by the lower court, that all four of the sureties, with their wives, were liable. If this meeting is to be given the same effect as the statutory notice, it could bind only those present. But it does not seem to us it can be held that this meeting can take the place of notice. The utmost that could be claimed for this meeting is that the sureties present received actual notice that respondent's bill for materials furnished had not been paid. The statute requires more than actual notice of an unpaid bill. It requires the creditor shall do something that shall signify to the surety his purpose to look to the bond for reimbursement. We have many statutes requiring the giving of notice before materialmen can enforce a liability against one with whom he has had no contractual relations, such as the sending of duplicate statements of account of materials furnished before a liability can be enforced against the owner of any building for materials furnished for its construction. We apprehend that a materialman could not excuse himself for failing to send these duplicate statements by saying the owner had knowledge that the material had been furnished, that it had not been paid for, and that a claim would be made against him for payment. The legislature has a right to say under what circumstances a primary liability shall be extended; and when it has so said, the liability cannot be enforced, unless there is at least a substantial compliance with its exactions. The statute, in cases of this character, becomes a part of the bond, and it is just as essential that there be substantial adherence to its requirements as that there should be a default in the obligations of the bond. We therefore hold that actual notice cannot take the place of this written statutory notice, and that no liability can be enforced against sureties under a bond of this character, without some form of written notice which shall substantially conform to the requirement of the statute. It is generally held that, where notice is re-

quired in a legal proceeding, especially where as a condition precedent there is some statutory requirement for filing notice, this means written notice. *Pearson v. Lovejoy*, 53 Barb. 407; *Foley v. Mayor etc. of New York*, 1 App. Div. 586, 37 N. Y. Supp. 465; *State ex rel. Burns v. Supervisors of Town of Elba*, 34 Wis. 169. Not finding any such notice in this case, we can fix no liability upon these sureties, and the judgment is reversed.

MOUNT, FULLERTON, ELLIS, and MAIN, JJ., concur.

[No. 10620. Department Two. January 22, 1913.]

HELEN BENSON *et al.*, *Appellants*, v. ENGLISH LUMBER COMPANY, *Respondent*.[1]

DEATH—ACTIONS FOR WRONGFUL DEATH—CONSOLIDATION—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 183, giving the heirs or personal representatives of one killed a right of action for wrongful death, authorizes but one suit, to be prosecuted in a single proceeding; hence separate actions by different heirs are properly consolidated.

MASTER AND SERVANT—INJURIES—EVIDENCE—QUESTION FOR JURY. The question of the negligence of a logging company is for the jury, where it appears that, in hauling in a heavy log which struck a mound of earth, a steel hook broke, striking and killing a servant, and that the hook was made of an inferior grade of steel and had a defect known as a "cold shut," which could be easily detected by the blacksmith making it, and which made the hook much more liable to break than one properly made of high grade steel.

SAME—SAFE APPLIANCES—FELLOW SERVANTS. No question of fellow servants arises, where the jury could find a violation of the master's primary duty to furnish a reasonably safe appliance.

SAME—SAFE APPLIANCES—ASSUMPTION OF RISKS—RELIANCE ON ASSURANCE. The servant does not assume the risk of danger from the master's furnishing an appliance with inherent defects of which the servant had no knowledge, and which a superior servant assured him was all right.

[1]Reported in 129 Pac. 403.

SAME—CONTRIBUTORY NEGLIGENCE OF SERVANT—PROXIMATE CAUSE—EVIDENCE—QUESTION FOR JURY. Contributory negligence being an affirmative defense, with the burden of proof upon the defendant, and the question being for the jury where the testimony raises an uncertainty upon which reasonably fair-minded men will differ, the court cannot say that a man employed in logging as a "chaser" was guilty of contributory negligence, as a matter of law, in standing where he was struck when a defective hook broke; since the proximate cause of the injury was for the jury, even if contributory negligence was a remote cause or a mere condition of it; and the court could not speculate as to the existence of any fact necessary to establish contributory negligence.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered October 21, 1911, upon granting a nonsuit, dismissing an action for wrongful death. Reversed.

Buck, Benson & McLane, for appellants.

Ballinger, Battle, Hulbert & Shorts, for respondent.

ELLIS, J.—The plaintiffs, aged respectively five and seven years, children of Ole Benson, deceased, brought separate actions by their guardian *ad litem* to recover for the wrongful death of their father through the alleged negligence of the defendant. Upon motion of the defendant, the two actions were consolidated. The consolidated action came on for trial, and when the plaintiffs had closed their evidence, the defendant challenged its sufficiency by a motion for nonsuit, upon the grounds, that the plaintiffs had failed to prove any negligence of the defendant as charged; that the evidence showed that the deceased was guilty of contributory negligence and had assumed the risk; and that, if any negligence was shown, it was that of a fellow servant. The challenge was sustained, and the action was dismissed. The plaintiffs have appealed.

The material evidence may be condensed as follows: The respondent was engaged in the logging business, and conducted it in the ordinary way. The logs were dragged out of the woods upon the ground by a donkey engine placed

at the landing. This was done by means of a wire cable extending from the engine, through certain blocks and pulleys, back into the woods, where the cable was fastened to the logs by means of a "choker." The crew engaged in this work consisted of several men, among them a "hook tender," a "rigging slinger," and a "chaser." All of the crew were under the control and supervision of the hook tender, who acted as foreman. As such he had charge of and superintended the work. He had immediate charge of the logs until they had been hauled out of the woods into the clearing about the landing, when the chaser took charge of them and directed their progress the rest of the way to the landing. The deceased was acting in the capacity of chaser.

At the time of the accident, a log had been hauled out of the woods by means of the cable, blocks, pulleys and swivel, under the direction and supervision of the hook tender, a distance of between 400 and 500 feet, to a point about 150 feet from the landing. One witness said the log was large and heavy; another that it was not very large nor unusual in any way. At or near that point, a part of this more complicated adjustment of the cable, referred to in evidence as the swivel, broke. The hook tender came out of the woods, and it was determined to drag the log the rest of the way by means of a stub line operated by a direct pull, without the intervention of blocks or pulleys. The hook tender himself superintended and, with the assistance of the rigging slinger, adjusted this line, attaching it to the choker about the end of the log by means of a steel hook. The deceased was present at the time and, one of the witnesses stated, assisted in the work. The hook tender testified that, when this operation was completed, he told the deceased that "everything was all right, to go ahead with the log." He also said that he told the deceased and the other man "to step back out of the way." The hook tender himself went back of the log, and the rigging slinger and the deceased went to a position ten or twelve feet to one side and slightly

forward of the log. The hook tender testified that, in case a hook broke, the piece might fly in any direction, back of the log as well as to the side, and that no one could tell which way it would fly. At that instant the engine was started with an even, steady pull, swinging the log around in line with the cable, when the log, becoming somewhat embedded in a small mound of earth, ceased to move and the hook broke, the cable recoiling toward the engine, and the detached piece of hook flying in the direction of the deceased. Something—no witness testified what—struck the deceased in the forehead, crushing it and causing his death. It seems probable that it was the fragment of hook, as the piece was found at his side immediately after he fell.

No one could say who gave the signal to start the engine, but it seems to be admitted that it was the chaser's duty at this stage of the work either to give the signal himself or to notify the signalman to give it. All of the evidence as to the actual accident was given by the hook tender and the rigging slinger, who seem to have been the only near eyewitnesses. They both testified that it was no uncommon thing for the hooks or other parts of the rigging to break in pulling a heavy log, and that the men knew that something was liable to break. The hook tender also testified that the deceased was inclined to be careless about getting out of the way, and had often been warned to be more careful. The hook tender, immediately after the accident, found the piece of broken hook at the side of the deceased, and tossed it away; seeing which, another witness picked it up, and positively identified it when it was produced at the trial. Two blacksmiths, of long experience in working with steel and in the making of hooks and other appliances for logging and other purposes, were qualified as experts, and on examination of this piece of hook, testified that it was made of a low grade of tool steel, and that the break showed a defect in the making, known as "cold shut," caused by bending the steel at too low a temperature. They both testified that a

hook made of low grade steel, such as this, was much more brittle and likely to snap, and will stand much less strain, than one made of a high grade of steel, and has a less close grain and looks differently when broken. Both testified that a cold shut, such as shown on this fragment, greatly weakened the hook, and that any blacksmith in making a hook could detect at once whether there was a cold shut in it.

As a preliminary contention, the appellants claim that the court erred in consolidating the two actions. The actions were brought under Rem. & Bal. Code, § 183, giving a right of action for wrongful death. We have construed this section as granting but one cause of action, to be prosecuted in a single proceeding by the heirs or personal representatives of the deceased. *Koloff v. Chicago, Milwaukee & P. S. R. Co.*, *ante* p. 543, 129 Pac. 398; *Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162; *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831; *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333. The court committed no error in ordering the consolidation.

Was the nonsuit properly granted? The respondent contends that no negligence or violation of its duty to the deceased was established. The duty of the master to exercise reasonable care to furnish the servant with a reasonably safe place of work and reasonably safe appliances so that the servant may not be exposed to unnecessary hazards, is positive and nondelegable. This has been so often held by this court as to require no citation of sustaining authority. That the jury might reasonably have found that the hook furnished by the master was not reasonably fit for its intended purpose, either because of the inferiority of the steel of which it was fashioned or because of the weakening effect of the cold shut, both of which defects could easily have been discovered in the making, and the latter at least by subsequent inspection, seems under the evidence too plain for argument. Respondent suggests that, with so heavy a log partially embedded in earth, any hook would be likely to

break. Sufficient inherent causes for the breaking having been shown, the jury would not be required to speculate, nor are we, as to what added strain a sound hook made of good material might have sustained.

The contention that the negligence, if any, was that of a fellow servant is equally untenable. There being evidence from which the jury might have found a violation of the primary duty to furnish a reasonably safe hook, no question of fellow service was involved. *Koloff v. Chicago, Milwaukee & P. S. R. Co., supra; Hicks v. Jenkins*, 68 Wash. 401, 123 Pac. 526; *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369. The question of the respondent's negligence was for the jury.

Since there was evidence from which the jury might have found that the hook broke because of inherent defects, the deceased did not assume the risk of that danger unless he knew of the defects. There is no evidence that he ever saw the hook, and the evidence that he had anything to do with the adjustment of the stub line was meager. As their titles would indicate, the hook tender and rigging slinger would be expected to perform that duty, and the evidence shows that they were mainly instrumental in performing it in this instance. We are not impressed by the hook tender's statement that, when he came out of the woods, he at once came under the chaser's orders. This was a mere conclusion, and his own actions at the time negative its soundness. He personally assisted in and superintended the adjustment of the stub line, assured the other men that it was all right, and told the deceased to go ahead with the log. There was no act or circumstance from which a relinquishment of his command can be inferred. The duty of inspection was upon the master. The assurance of the hook tender that the tackle was all right was the assurance of the master upon which the deceased had the right to rely.

"On the other hand, the servant does not accept the risks of unknown, latent, unseen, or obscure defects or dangers,

such as the servant would not discover by the exercise of ordinary care and prudence, having reference to his situation, but such as the master ought to discover by exercising the duty of inspection which the law puts upon him to the end of seeing that the premises, tools, and appliances with respect to which the servant is required to labor are in a reasonably safe condition; since the servant is not, in general,—except where he has agreed to do so by contract with his master,—required to institute *special inspections* for the purpose of discovering hidden dangers." Thompson, Negligence (2d ed.), 664, § 4641.

A more difficult question is presented by the claim of contributory negligence. It is not pretended that there was any duty upon the deceased to inspect the hook, or that he had anything to do with its selection. The sole claim is that he was negligent in standing where he did. It is well established that in this state contributory negligence is an affirmative defense, and that the burden is upon the defendant to establish it. *Currans v. Seattle & San Francisco R. & Nav. Co.*, 34 Wash. 512, 76 Pac. 87; *Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659, 29 Pac. 346; *Randall v. Hoquiam*, 30 Wash. 435, 70 Pac. 1111; *McLeod v. Chicago, Milwaukee & P. S. R. Co.*, 65 Wash. 62, 117 Pac. 749. While this defense may be established by the plaintiff's evidence, it is also well settled that, where there is uncertainty as to its existence, "whether the uncertainty arises from a conflict in the testimony or because the facts being undisputed, fair minded men will honestly draw different conclusions from them," the question is not one of law, but one of fact to be determined by the jury. *Richmond & Danville R. Co. v. Powers*, 149 U. S. 43; *Currans v. Seattle & San Francisco R. & Nav. Co., supra; Henry v. Seattle Elec. Co.*, 55 Wash. 444, 104 Pac. 776; *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214.

The courts are, therefore, not at liberty to speculate as to the existence of any fact necessary to the establishment of the defense of contributory negligence. Every essential fact must be so plain that the minds of reasonable men may

not differ thereon, before the court will be justified in withdrawing the question from the jury. *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191. Moreover, even assuming that the deceased was guilty of negligence, if the defendant's negligence was the proximate cause of the injury, while that of the deceased was only a remote cause or a mere condition of it, the defendant is still liable. *Redford v. Spokane Street R. Co.*, 15 Wash. 419, 46 Pac. 650; *Atherton v. Tacoma R. & Power Co.*, 30 Wash. 395, 71 Pac. 39. What was the proximate cause of the injury was a question for the jury under proper instructions. *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360.

Conceding that the deceased was guilty of contributory negligence in standing where he did, it is still manifest that, before the jury could have found that negligence the proximate or efficient cause of the injury, it must also have found that the hook would have broken had it been without defect and made of good material. To hold that, as a matter of law, the decedent's negligence was the proximate cause of the injury, as must be held to justify a nonsuit, is to hold without evidence to that effect and on mere suspicion that a sound hook made of good material must have broken in any event. We would also have to hold, as a matter of law, that a sound hook must have broken at the same instant that this did, since if the hook had held for a longer time, the deceased might have changed his position or the log might have been dragged beyond him. Such speculation will not be indulged in order to grant a nonsuit. The question of contributory negligence in all of its phases was one for the jury.

The judgment is reversed, and the cause is remanded for a new trial.

MORRIS, MOUNT, FULLERTON, and MAIN, JJ., concur.

[No. 10543. Department Two. January 22, 1913.]

ADA BELLE ARMSTRONG, *Appellant*, v. SPOKANE & INLAND EMPIRE RAILWAY COMPANY, *Respondent*.[1]

STREET RAILWAYS—INJURY TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION OF LAW. A pedestrian, standing so close to a track while waiting for a street car, that she was struck by a car coming from the opposite direction, is guilty of contributory negligence, as a matter of law, where it appears that the street was being graded, that she knew the company was using but one track where the work was not completed, that she was told that her car was waiting at a switch for another to come down, and that the night was dark and the street unlighted, and with no traffic or noise on the street, she paid no heed to the approaching car.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MATERIALITY. It is not error to refuse plaintiff a new trial for newly discovered evidence as to defendant's negligence, when the case was properly dismissed because of plaintiff's contributory negligence.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 18, 1912, upon sustaining a challenge to the sufficiency of plaintiff's evidence, dismissing an action for personal injuries sustained by a pedestrian struck by a street car. Affirmed.

Morrill, Chester & Skuse, for appellant.

Graves, Kizer & Graves, for respondent.

MORRIS, J.—Appellant began this action to recover for injuries claimed to have been sustained through the negligence of the respondent. Upon the trial, the appellant having put in her evidence, the court, upon motion of respondent, sustained a challenge to the sufficiency of the evidence, and deciding as a matter of law that verdict should be in respondent's favor, discharged the jury and dismissed the action.

The appeal urges error in this ruling. The record does not disclose the reasons for the court's ruling, as it contains

[1]Reported in 129 Pac. 379.

neither the argument of respective counsel upon the motion nor any comment made by the court, but is confined in this particular to the formal entry of judgment with recitals as above indicated. We assume, however, from the briefs that the point considered was contributory negligence, and our discussion will be confined to that question.

The appellant, who resides at Spokane, had spent part of the evening of September 23, 1912, at the home of a friend, Mrs. McCauley. At about 7:30, the two ladies started down town, and walked a block to the corner of Washington street and Augusta avenue to take a south-bound car on Washington. The night is described as quite dark. There were no street lights on Washington within two blocks of this corner, and shade trees obscured the light one block east on Augusta. Washington street was being paved at this point. The west half of the street was evidently finished, while the east half had only the loose foundation rock laid thereon. Red lights were displayed as a warning of the unfinished condition of the street.

Prior to the street being torn up for paving, respondent maintained two tracks, the east track for north-bound and the west track for south-bound cars; but while the paving was being laid, it had been the custom to run cars in both directions on one side of the street while the other was being paved, and to alternate between the east and west tracks according to the condition of the street, the cars always running on the side of the street on which the paving had been completed, and having frequent cross-over switches to enable them to do so. Appellant knew of this custom, as she was a frequent passenger on this line, although for a week prior to the accident she had been using the Division street line to take her down town, and did not know the situation in this particular at this corner.

Appellant and Mrs. McCauley reaching Washington street, crossed over to the west side, looking up and down the street for approaching cars. They saw one turning east

into Sinto avenue, three blocks south, and another at Indiana avenue, two blocks north. Sinto avenue is the crest of a hill, and from that point to Indiana avenue is a down grade. As appellant saw the car at Indiana avenue, she spoke to Mrs. McCauley, saying, "There is a car coming;" to which Mrs. McCauley replied, "That car is waiting at the switch for another to come down." Reaching the west side of the street, appellant took a position alongside and apparently quite near the car track, and standing facing north, centered attention upon the car at Indiana avenue, Mrs. McCauley standing behind her. She says she heard no bell or other warning of an approaching car. During the short time they so stood, nothing was said until appellant heard Mrs. McCauley call her name, and turning to the south, was immediately struck in the face by a north-bound car and knocked to the ground.

Mrs. McCauley testifies that they stood there a short time, perhaps three or four minutes, when she heard a car bell, and looking around to the south, saw a car coming north, apparently between Sinto and Maxwell avenues, which would be between the second and third blocks to the south; that the car was running fast, and she watched it as it came down, and as it approached her she stepped back and looked around at appellant, who just then threw up her hand and said, "Pshaw." Fearing the car was about to strike appellant, she "made a grab for her, and called her name to draw her attention to the fact the car was coming," but before she could reach appellant, the car struck her. This is, we think, all the testimony in the case that is material upon the question of contributory negligence.

It is apparent that appellant, with her attention riveted upon the car at Indiana avenue, and impatiently awaiting its arrival, was wholly oblivious of her surroundings. The fact that the Indiana avenue car was not approaching, coupled with Mrs. McCauley's remark that it was waiting at the switch for another car to come down, the red signal

lights indicating an uncompleted condition of the street at that point, her knowledge of what that uncompleted condition meant, and that while it existed, both north and southbound cars ran on one track, and that track the one on the finished side of the street, the dark night, with its lack of light—all these facts would, it seems to us, indicate to any person of ordinary prudence that some attention must be taken of them as indicating an unusual situation that required at least ordinary care; and that, under such circumstances, it was not ordinary care, nor the act of a woman of ordinary prudence, to stand upon or so close to a street car track as to be struck by a passing car. Her remark to Mrs. McCauley just before she was struck, and her gesture when she threw up her hand and said "Pshaw", indicated her impatience at the delay of the car at Indiana avenue. What was the cause of the delay? Mrs. McCauley had told her in response to her suggestion of a coming car when they first observed it. She had been told that the car was on the switch waiting for another car to come down from the south. With two tracks there would be no necessity for such a wait, but with one there was, and she knew why, although she says she did not know it that night, meaning, we take it, that it did not occur to her or that she forgot it. She was on the completed side of the street, and, although she had not been on this line for a week, her previous experience as a passenger had taught her that the track on the completed side of the street was the one used by cars going in both directions.

She says she heard no car approaching, nor any indication of its approach; but how can we escape the conclusion that, if she did not, it was only because she was oblivious of everything except the Indiana car and her strong desire for its coming? Mrs. McCauley, standing just behind her, heard a bell, and turning, saw the car that struck her between two and three blocks away, and watched it as it came down the grade. We know, therefore, that there was a signal

of danger sufficient to engage Mrs. McCauley's attention and enable her to take a position of safety. True, Mrs. McCauley says she does not know whether it was a bell on this car that she heard or not. Whatever it was or wherever it was, it served the purpose of conveying information to her that a car was approaching.

Had appellant been as alert as Mrs. McCauley, it would have served the same purpose to her and prevented her injury. What was the difference in the attitude of these two women? It seems to us the answer is, the difference between a woman of ordinary prudence, exercising ordinary care for her safety and thus enabled to prevent injury, and one who overlooks every present fact calculated to draw her attention to her surroundings, and impelled by her impatient desire for the quick approach of her car, forgets everything but that desire. She says she heard no warning bell. We will overlook the testimony of Mrs. McCauley, and using only the facts that cannot be disputed, we know that a heavy modern street car, running at fifteen or more miles an hour in an outlying district of the city, no traffic upon the streets, no interfering noises, will make some noise as it approaches, and that its lights, exterior and interior, will convey some evidence of its approach to those who are on the lookout for it. We have said "at fifteen or more miles an hour," because the evidence fixes the speed of the car as "very fast" without attempting to approximate its speed, and as the city ordinance permits a speed of fifteen miles per hour in that section of the city, we think it can be safely assumed under the testimony that the car was running at least fifteen miles an hour. One of two conclusions is irrefutable; the appellant was either standing so close to the track that a car could not pass her with safety, or, attracted by Mrs. McCauley calling her name, she in turning inclined her head and the upper portion of her body towards the track. The fender of the car evidently passed her, and as she received the blow "about the center of the top of the forehead" and

on the right arm and shoulder, it is, we think, the more evident conclusion that, in turning toward Mrs. McCauley, she protruded her head and right shoulder beyond her body and into the passageway of the car. One of these situations is the true one; which one is immaterial. Her act was a proximate cause of her injury.

The law of contributory negligence is so well established and has been written in so many phases that nothing new can be now added. All that any discussion can do is to assert the principles which establish it, and these principles are so well known and understood that there is little room for discussion left. The facts must decide. As was said in *Keefe v. Seattle Elec. Co.*, 55 Wash. 448, 104 Pac. 774, "The facts declare the law in such cases." The basic principle of all the cases is: Was the injured person, at the time of the injury, exercising such care for personal safety as a person of ordinary care and prudence would exercise under like circumstances; and if not, was such lack of care a proximate cause of the injury? As the question is answered, contributory negligence is or is not established. It does not seem to us that, employing the test used in answering this question as a matter of law, the minds of reasonable men can differ in arriving at the conclusion that appellant was not exercising the required degree of care, and that her lack of it was a proximate cause of her injury. We accept appellant's citation from *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351, that:

"When a court decides, as a matter of law, that an injured plaintiff is precluded from recovering damages for his injury, because of his own negligence contributing thereto, the court is in effect deciding that facts have been affirmatively proven which conclusively show, as a matter of law, such contributory negligence."

To our minds such facts as we have recited do so "conclusively show, as a matter of law, such contributory negligence." Much as courts would like to cast the whole burden

of finding contributory negligence upon the jury, there are cases in which that duty must be accepted and the court must pass upon undisputed facts, when its honest judgment, conscientiously expressed, leads to a firm conviction that but one determination can be reached in the minds of reasonable men. Counsel for appellant seeks to avoid the legal force of appellant's knowledge of the condition of the street and that the cars in both directions ran on one track along the side of the street upon which the paving had been finished, by referring to appellant's testimony that she "did not know it that night," arguing that this brings her within the rule laid down in *Passage v. Stimson Mill Co.*, 52 Wash. 661, 101 Pac. 239, and other cases, that momentary forgetfulness of known dangers does not necessarily bar recovery by an injured servant. Such rule, admitting its value in a proper case, has no application here. As applied in the *Passage* case, it refers to the relation of master and servant. A better case in support of this contention would be *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114, not cited by counsel, where it was held that knowledge of a defective sidewalk would not in law preclude a recovery, where it appeared that the night was so dark the defect could not be seen and the injured person was using precautions to avoid it. That case, however, and those which it follows, differ from this, from the fact that, while knowing the danger, the injured person was using precautions to escape it. Here the appellant was making no use of her knowledge, nor attempting in any way to have it contribute to her safety. Had her general knowledge of the situation not occurred to her, the red lanterns upon the street, the car at Indiana avenue waiting, as she was informed by her companion, for another car to come down, would recall to a person of ordinary prudence the fact that this car, following the custom she well knew, would not proceed until another car came down upon the same track.

Appellant cites *Beecher v. Long Island R. Co.*, 161 N. Y. 222, 55 N. E. 899. We can see no similarity between that case and this. There the evidence was such that the jury were justified in finding the railroad company had adopted a certain custom of starting its trains, and had continued it so long as to constitute an invitation to passengers to do the very thing the plaintiff was doing at the time of the injury, and the fact is pointed out as sustaining the judgment. *North Chicago St. R. Co. v. Irwin*, 202 Ill. 345, 66 N. E. 1077, is also relied upon. In that case the accident happened while the deceased was riding a bicycle in the space between the car tracks. He was traveling north, and the evidence tended to show that, hearing the approaching car, he ran onto the west track, which was the track customarily taken by south-bound cars, and which would have afforded him a safe passageway had the car been traveling north upon the east track as he had reason to believe it was. It appeared, however, that the car which killed the deceased was one of two cars that each night were sent to the car barn over the west or south-bound track. There was no evidence that deceased knew that these two cars customarily went north on the west track. These facts are given great prominence by the court in its opinion. The distinction between that case and this will be readily seen. There, there was no evidence of knowledge that the car was proceeding upon the west track. Here the appellant admits she had known such fact for a long time, but attempts to excuse such knowledge by inferring that she did not think of it that night, and had not observed the custom at this particular point. Her knowledge, however, embraced this custom wherever made necessary by the condition of the street, as to which side was completed and which uncompleted; and that knowledge did, by reason of the significant facts, cover this particular point. It, therefore, seems to us that the court below was justified in its ruling, and the same is sustained.

Some complaint is made that a new trial should have been

granted upon newly discovered evidence. This evidence all went to the negligence of the respondent, and is not material upon the question of contributory negligence, and hence upon that decisive point it was not error to rule against the new trial.

The judgment is affirmed.

MOUNT, ELLIS, FULLERTON, and MAIN, JJ., concur.

[No. 10522. Department One. January 23, 1913.]

MARTIN HANSON, *Appellant*, v. SILAS M. SHIPLEY, *Respondent*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—DUTY TO WARN—UNKNOWN DANGER—ASSUMED RISKS. Where an experienced man in clearing land fastened a chain to a log to be dragged by a team, without knowing that the end of the log was attached to the ground by the roots, causing the top to swing around and strike him while he was standing in the sweep of the top when the team started, the master owed no duty to warn him of the starting of the team; since he had an equal or better opportunity to know of the danger, which makes it one of the assumed risks of the business.

Appeal from a judgment of the superior court for King county, Main, J., entered January 25, 1912, upon granting a nonsuit, dismissing an action for personal injuries sustained by an employee engaged in clearing land. Affirmed.

Martin J. Lund, for appellant.

Will H. Morris and *E. P. Dole*, for respondent.

MOUNT, J.—Action for personal injuries. The trial court granted defendant's motion for a nonsuit at the close of the plaintiff's evidence, and dismissed the action. The plaintiff has appealed.

It appears that the plaintiff was in the employ of the defendant, who was clearing some land upon Vashon Island. At

[1]Reported in 129 Pac. 377.

the time of the injury to the plaintiff, on July 5, 1910, he and two other employees were engaged in gathering up and burning sticks and logs upon the clearing. A team of horses was used in dragging logs too heavy to be carried to the fire. One of these employees, Matson by name, was driving the team. In the course of the work they came to a cedar log, about five to eight inches in diameter, and about fifteen or sixteen feet long, the top end of which had been cut off. This tree or log had some time previously been blown down, and was for that reason called a wind-fall. The roots on the under side of the base were still in the ground, and plaintiff fastened the chain which was used for that purpose near the top of the log. Mr. Matson, who was driving the team, directed him to fasten the chain around the log near the base. Plaintiff did so, and put the chain around the log about three feet from the base, and hooked the other end of the chain to the double trees to which the team was attached, and started to walk away between the team and the top of the log. As the plaintiff was walking away, the driver started the team without further warning. The roots held the base of the log and caused the top to swing toward the team. As it did so, it struck the plaintiff and broke his leg.

It is claimed by the appellant that Mr. Matson was a vice principal, and that he started the team without warning the plaintiff or giving him time to escape, and thereby put in motion a dangerous agency; that his duty to warn the plaintiff was imperative under the rule in *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *McLeod v. Chicago M. & P. S. R. Co.*, 65 Wash. 62, 117 Pac. 749; *Hall v. Northwest Lum. Co.*, 61 Wash. 351, 112 Pac. 369, and similar cases. But it is apparent that the starting of the team in this case was not putting into action a dangerous agency, as in those cases. It may well be questioned if Mr. Matson was a vice principal. But conceding, for the purposes of this case, that he was such vice principal, the rule is well settled that the master is not required to warn his servant of dangers which

the servant knows or has the same opportunity to know as the master. *Deaton v. Abrams*, 60 Wash. 1, 110 Pac. 615; *Props v. Washington Pulley & Mfg. Co.*, 61 Wash. 8, 111 Pac. 888.

It is not shown in this case that the master knew that the base of the log was attached to the ground by its roots, or that he should have known that fact. The plaintiff was an experienced man in this sort of work. He was within three feet of the base of the log. He put the chain around the log at that point, and had a better opportunity to see and know the condition of the log than the master, for it was not shown that the master was near that end of the log. It is plain, therefore, that there was no duty upon the master to warn the plaintiff that the top end of the log might swing around toward the team, for neither the master nor the servant knew or even supposed that the log was fast in the ground at its base.

The plaintiff says the team was started with a jerk. The only evidence of that fact is that the log swung around quickly; but that was caused, of course, by one end of the log being fixed while the other was free. The pull being near the fixed end, necessarily threw the other end around quickly. It is plain upon the whole record that the master was not negligent. The accident occurred solely because one end of the log was fixed to the ground, and neither the master nor the servant knew that fact. It was one of the risks of the business, one which the servant assumed when he undertook to walk away within the sweep of the log. The log was a small one, five to eight inches in diameter. There was no necessity for the plaintiff to walk in front of it where he knew it was to be dragged. He might readily have stood behind it, where there was no possibility of danger.

The court, therefore, properly directed a nonsuit. The judgment is affirmed.

CROW, C. J., PARKER, GOSE, and CHADWICK., JJ., concur.

[No. 10861. Department One. January 23, 1913.]

H. GANTENBEIN *et al.*, *Appellants*, v. THE CITY OF PASCO *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—PROCEEDINGS—REVIEW—CONTRACTS—VALIDITY—JURISDICTION OF COURTS—EQUITY—INJUNCTION. The fact that the statute provides for objections to proceedings before a city council to provide for public improvements under the special assessment plan, with the right of appeal to the courts, does not deprive a court of equity of jurisdiction to determine, in an injunction suit, whether the city council had power to enter into a contract under its proceedings for such an improvement.

SAME—CONTRACTS — VALIDITY—INTEREST OF COUNCILMEN. Under Rem. & Bal. Code, § 7702, providing that no officer of any city shall be interested directly or indirectly in any contract with such city, a contract between a city and a reclamation company for a public water supply is void, where the contract provided that the water company should supply to landowners in a reclamation district outside the city an extra six inches of water per acre, free of charge, and three of the councilmen whose votes were necessary to authorize the contract were among such landowners and were benefited by the contract; since it was impossible to segregate their interests and leave the contract unimpaired.

SAME—CONTRACTS—VALIDITY—PUBLIC POLICY. Where a reclamation company had agreed to supply water to subscribers who were owners of property in a reclamation district outside of a city, which agreed supply was inadequate to properly irrigate the land, a contract between the city and the reclamation company for a public water supply for the city, in which the reclamation company agreed to furnish an extra six inches of water per acre to such subscribers, free of charge, is against public policy and void; since the city would be paying for the free water furnished to landowners outside the city.

SAME—CONTRACTS—LOWEST BIDDER—FRAUD. In the absence of a showing of fraud, a contract for public improvements cannot be attacked because not let to the lowest bidder.

ON REHEARING.

STATUTES—CONSTRUCTION—PARTIAL VALIDITY—EFFECT. A statute will be upheld so far as it is legal, if the illegal part can be separated from the legal.

[1]Reported in 129 Pac. 374; 131 Pac. 461.

MUNICIPAL CORPORATIONS — PUBLIC WORKS — LETTING CONTRACT — PROCEEDINGS. A city can pass one or separate ordinances and let one or separate contracts for the construction of a water distributing system.

APPEAL — RECORD — AFFIDAVITS. Affidavits not made a part of the record cannot be considered on appeal.

Appeal from a judgment of the superior court for Franklin county, Holcomb, J., entered July 13, 1912, in favor of the defendants, dismissing an action to enjoin a city from installing a water works system for irrigation and domestic purposes, after a trial on the merits before the court. Reversed.

H. B. Noland and *Charles W. Johnson*, for appellants.

M. L. Driscoll (*P. F. Leonard*, of counsel), for respondent city of Pasco.

Danson, Williams & Danson (*George D. Lantz*, of counsel), for respondent Pasco Reclamation Company *et al.*

CHADWICK, J.—The legislature of 1911 passed two acts, chapter 98, p. 441, and chapter 111, p. 510, each designed to aid and empower cities and towns to acquire the benefits of water for irrigation. The city of Pasco, acting by its council, submitted a proposition to acquire a water system under chapter 98, the system and source of supply suggested being the one owned by the Pasco Reclamation Company. This was defeated. The council then undertook to provide a system under the special assessment provision in chapter 111. An ordinance was passed providing for the laying of pipes throughout the several assessment districts created by the ordinance, and a contract with the Pasco Reclamation Company was authorized. It will be necessary to advert in some slight degree to the history of this company. Reference may be had to the case of *Pasco Reclamation Co. v. Cox*, 70 Wash. 549, 127 Pac. 107, where the plan of organization and the purposes of the company are set forth. The testimony in this case shows that the contract of the com-

pany to furnish water to irrigate the lands described in the *Cox* case, all of which was outside of the city limits of Pasco, had been entered into under the mistaken belief that eighteen inches of water per annum were sufficient to raise and mature crops, whereas it has been practically demonstrated, and further in the opinion of experts, no less than twenty-four inches of water per annum are necessary.

Certain of the councilmen of the city of Pasco owned land under the irrigation project of the reclamation company, and had subscribed to the contract considered in the *Cox* case. In the negotiations leading up to the contract, and as it seems, as an inducement to the city to enter into the contract with the reclamation company, it was proposed that, in the event the city entered into a contract with the company and issued bonds in the sum of $50,000 and provided for an annual maintenance charge, all to be collected under the special assessment plan, the company would furnish to each of the contracting parties under its ditches outside of the city, provided they signed up a new contract, six inches of water in excess of the amount originally contracted to be delivered, or a total of twenty-four inches per annum. That part of the reclamation company's contract with the city of Pasco was as follows:

"It is further understood and agreed that certain contracts have heretofore been given to divers and sundry persons granting perpetual water rights to be used upon and appurtenant to certain lands therein described, the quantity of water to be supplied thereunder being only eighteen acre inches per season at $5 and not to exceed six inches additional at thirty-five cents (35c) per inch on each acre of land; and, a part of the consideration accruing to each and all the parties to this contract, and especially to the city of Pasco, is the agreement herein by the Pasco Reclamation Company to furnish to the holders of said last named contracts twenty-four acre inches per acre of land at $5 per acre, during each irrigation season between April 1st and October 1st, and in order to expedite at the minimum cost the modification of said contracts so as to give the said con-

tract holders the increased quantity of water herein offered to them, it is further stipulated that said contract holders may have and enjoy the benefit of said twenty-four acre inches of water per acre of land per irrigation season aforesaid by signifying their several and respective acceptances hereof in writing duly acknowledged and addressed and delivered to said Pasco Reclamation Company, or by joining in the execution of this agreement on or before the 1st day of September, 1912, the terms of said contracts to remain in force except as to the formation of said new corporation, the transfer of said system to it, and the quantity of water to be delivered."

The ordinances having been passed and the contract entered into, work was begun, and shortly thereafter this suit was instituted, plaintiff and others alleging the ordinances and contracts to be void for several reasons which will hereafter be noticed, and praying for a restraining order, and upon final hearing, a perpetual injunction. The case was tried out on its merits, and plaintiffs have appealed from an adverse decision.

The jurisdiction of this and the lower court is challenged by the respondents. The challenge is based upon the statute providing for objections and hearings before the council, and upon the following cases: *Broad v. Spokane*, 59 Wash. 268, 109 Pac. 1014; *Renard v. Spokane*, 48 Wash. 345, 93 Pac. 517; *Rucker Brothers v. Everett*, 66 Wash. 366, 119 Pac. 807, 38 L. R. A. (N. S.) 582; *Chandler v. Puyallup*, 70 Wash. 632, 127 Pac. 293, and many cases from other jurisdictions. This court, in common with others, has held that it is competent for the legislature to create a special tribunal, either directly or indirectly to hear and determine all questions going to the regularity of proceedings brought under statutes providing for improvements made under the special assessment plan, as well as the amount to be charged against specific property; that the conduct of such board, commission, or committee will not be controlled through the use of extraordinary writs; that we will not in such proceed-

ings question the motives of the officers; and that the party aggrieved must first submit to the judgment of the legislative tribunal and then appeal.

There has been much misuse of the word "jurisdiction" in the cases. There is a vast difference between jurisdiction and the exercise of jurisdiction. That the courts have jurisdiction to construe contracts cannot be denied, for it is granted by the constitution. If any of the cases cited seem to hold otherwise, they should not be followed; for in the same cases the jurisdiction of the courts is not only admitted but asserted when it is said that the aggrieved party may come to the courts by appeal, the only question decided being that the legislature may define remedies and direct procedure. The jurisdiction of the court is not defeated or taken away; it is only postponed.

"A court of equity has no rightful authority to interfere with the enactment of municipal ordinances, merely because it may question the expediency of the measures, the motives inducing their enactment, or the regularity of the proceedings by which they are being enacted; it is limited solely to an inquiry into the question of power." *Broad v. Spokane*, 59 Wash. 268, 109 Pac. 1014.

"It undoubtedly is a general rule that the courts will not interfere with an action of a body exercising legislative functions, to correct mere errors or mistakes in its proceedings, or to prevent the passage of a law or ordinance duly pending before a legislative body, because it may conceive that the law or ordinance will be ineffective if passed, but clearly the courts have power to inquire into the validity of a law or ordinance after it has passed the legislative body and an attempt to enforce it is made or threatened to the injury of the personal or property rights of the citizen. The courts have exercised this power since the foundation of the government, and it is not necessary now to enter into a discussion of the principles that are thought to justify it." *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797.

This brings us, then, to the only question open in this case, whether the city of Pasco, acting through its present

council, had power to contract as it did. One or two propositions are advanced by appellant, which it is asserted so tinged the whole proceeding with constructive fraud as to void the contract, and that for this reason a court of equity has unquestioned jurisdiction. We shall not go into a discussion of the difference between, and the effect of, the two statutes first referred to in this opinion, or whether the proceeding might be sustained by reference to Rem. & Bal. Code, § 7685, but will assume that the proceedings and contract are good under one or the other of them, unless they are avoided, (1) by the interest of the councilmen or some of them who voted for the ordinance, and (2) by any law or rule of public policy which would prohibit a city from entering into a contract which is beneficial to those residing outside of the corporate limits of the city when made at the cost of its property owners. To support the first proposition, appellant relies upon the case of *Northport v. Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204, while respondent relies on *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 104 Pac. 272, 28 L. R. A. (N. S.) 735. These cases were all decided upon the same statute. Rem. & Bal. Code, § 7702:

"No officer of such city shall be interested, directly or indirectly, in any contract with such city, or with any of the officers thereof, in their official capacity, or in doing any work or furnishing any supplies for the use of such city or its officers in their official capacity; and any claim for compensation for work done, or supplies or materials furnished, in which any such officer is interested, shall be void, and if audited and allowed, shall not be paid by the treasurer. Any wilful violation of the provisions of this section shall be a ground for removal from office, and shall be deemed a misdemeanor and punished as such."

It is said by respondent that the *Shaw* case distinguishes the *Northport* case, and that under it the city councilmen, when considering the assessment roll, can correct any irregularity and reject all illegal claims. In the *Shaw* case, an independent contractor had completed an improvement. He

had purchased supplies of various persons, firms, and corporations. Among others, he dealt with the mayor of the town of Snohomish. It was contended that this leaven of illegality voided the whole contract, and that no recovery could be had on any part of it. We held, that the contract intended by the statute was the one entered into by the officer, that when he was denied a recovery, the purpose of the law was accomplished, and that the main contract would be void only *pro tanto*. In other words, where the nonrecoverable items could be eliminated, the assessment roll would be made up and become a lien for the aggregate of the remaining items. We suggested that possibly the *Northport* case had failed to note the difference between valid and invalid claims, and said the statute is aimed at the officer and intended to prevent a recovery on his part, or to the extent of his interest, when the claim is asserted by another. But we did not intend to question the broad rule of statutory and general policy as defined in the *Northport* case. The legality of the principal contract—the one with the city—could in no way be affected by a subsequent dealing with an officer, or a contract on his part to furnish supplies or material; and if this were a case where a recovery was sought by an officer or one claiming under him, we would not hesitate to apply the rule of the *Hodgins* case. But it is not. There is no money demand that can be eliminated. The interest of the affected councilmen lies in the collateral benefit to be received by them, which, because of its nature, is impossible of segregation so as to leave the main contract unimpaired. This case, therefore, necessarily falls within that part of the statute which says, "No officer of such city shall be interested directly or indirectly in any contract with such city." Here three of the councilmen whose votes were necessary had a direct personal interest—an interest not general to all the citizens within the corporate limits of the city or the assess-

ment districts. If it were so, no legal objection could be urged.

If we assume that the contract was an advantage to the reclamation company (and the law will so presume), the offending councilmen were, to the extent of their interest, sharers in that advantage. They found relief from a contract to furnish an inadequate supply of water, and substituted therefor one that was designed to make their desert land fruitful and remunerative. While the statute does not in terms say that a contract so passed is void, the courts have with one accord held that they are so, for it is within the positive meaning of the words "no officer shall be interested" in any contract. If we hold that, notwithstanding the prohibition of the statute, such contracts can be sustained, then we have written the statute out of the books. There can be no middle ground where the prohibition of the statute enters into the letting of the original contract. *State ex rel. Gladwin v. Cheney*, 67 Wash. 151, 121 Pac. 48, was a case of this kind. As said in the *Northport* case:

"Long experience has taught law makers and courts the innumerable and insidious evasions of this salutary principle that can be made, and therefore the statute denounces such a contract if a city officer shall be interested not only directly, but indirectly. However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void."

The question whether the contract is beneficial cannot enter into the inquiry. When it is made to appear that the councilmen were placed in such a position that their interest might conflict with their fiduciary relation, the inquiry is closed and the bar of the statute falls. Our conclusion is supported by the following texts and the cases cited therein: 2 Dillon, Municipal Corporations (5th ed.), 772; McQuillan, Municipal Corporations, 513; 28 Cyc. 650.

Coming now to the second proposition, we are of the opin-

ion that the contract is contrary to public policy. We must presume, that the original contract between the outside subscribers and the reclamation company was fair; that the company was furnishing all the water that it could supply with fair profit to itself at the price charged, and that it would not have relaxed its contract but for the contract with the city. Now, if the company in consideration of the collateral contract, the cost of which is met by the citizens within the corporate limits of Pasco, voluntarily furnished this additional water without cost to the landowners, and the testimony shows that there are about 15,000 acres, the presumption follows that the residents within the proposed assessment districts are paying for this extra allowance for the benefit of those outside of the limits of the city. Water in the arid areas of this state is a thing of value, and in the absence of a positive showing, courts will judicially notice the fact that irrigation companies will not make it a subject of gift. We cannot hold that any public improvement within a city can be allied with separate contract rights outside the municipality. To do so would put the hazard of litigation upon the city or upon the owners of property therein, and this is a consequence which the law would not tolerate.

Counsel for the city of Pasco make the point that the case should not turn upon a construction of the contract, because to do so would be to ignore § 31 of the public service commission law, which is designed to protect all patrons of public service corporations from impositions in the way of excessive or unreasonable rates; that if it should now or hereafter appear that the contract is burdensome to the citizen, the commission and the courts can force a reasonable rate irrespective of statute or contract. Granting, without admitting, that this might be true if the only question before us was one of rates, the principle cannot enter or control this case, for the contract being made in contravention of the statute and of public policy, it matters not whether it is beneficial or subject to correction at the end of an inquiry or

a lawsuit. In law it is not merely an irregular contract, but it is as if no contract had ever been entered into.

As a part of the plan, the city let contracts for piping systems to be laid through the assessment districts. These contracts are attacked because not let to the lowest bidder. There is no showing of fraud, and therefore the contract cannot be objected to on the ground urged. The case falls within the rule announced in *Stern v. Spokane*, 60 Wash. 325, 111 Pac. 231.

The case is reversed, and remanded with instructions to enter a decree in accordance with this opinion.

CROW, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

ON REHEARING.

[Decided April 15, 1913.]

PER CURIAM.—One of the questions raised in this case was that the contract let by the city of Pasco to the defendant Lund was invalid, for the reason that it was not let to the lowest bidder. It was our conclusion that the evidence brought the case within the rule announced in *Stern v. Spokane*, 60 Wash. 325, 111 Pac. 231. We are asked to restate or modify our opinion, inasmuch as the parties are not certain whether our holding would deprive Lund of the benefit of his contract. The ordinance we held to be invalid provided for the letting of a contract for the piping or distribution system, as well as for the purchase of water from the Pasco Reclamation Company. Under chapter 98, Laws 1911, p. 441, and chapter 111, Laws 1911, p. 510, the power is granted to the city to construct "a piping system for the distribution of water . . . by the establishment and creation of assessment districts," provided that the mayor and council shall by ordinance or resolution adopt plans therefor. The record does not disclose any objection to Lund's contract, other than that it was let under the same ordinance that we held to be invalid in so far as the Pasco Reclamation contract was concerned. It is not shown that the council, or any of them, had

any interest in the contract of Lund. We did not intend to hold that the contract with Lund was invalid, for the reasons urged against the Pasco Reclamation contract. It seems to us that our opinion inferentially holds just the contrary. This court has habitually set itself against any interference with the discretion of the legislative bodies of the state, and has gone so far as to hold that, if the illegal can be separated from the legal, we will sustain that which is good and reject that which is bad. We feel warranted in applying that rule in this case. We think the case falls within the spirit, if not the letter, of *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 104 Pac. 272, 28 L. R. A. (N. S.) 735. To hold otherwise would be to hold that the city is bound to let a contract for its distributing system at the same time it acquires water and as a part of the same general scheme; whereas the rule, as we understand it to be, is that the city can pass one or separate ordinances and let separate contracts for all or any part of the work, or may, if not otherwise restrained, do the work or any part of it itself. Our holding therefore, is that the contract of the city of Pasco with the defendant Lund does not come within the rule announced in the case against the Pasco Reclamation Company.

With the petition for rehearing and restatement of our opinion, an affidavit is offered tending to show that one of the council had an interest in Lund's contract. The affidavit is made by a third party, and is not certified as a part of the record, and will not be considered.

[No. 10557. Department Two. January 24, 1913.]

THE CITY OF SEDRO-WOOLLEY, *Appellant*, v. ROSE L. WILLARD *et al.*, *Respondents*, JOSEPH LEDERLE *et al.*, *Defendants*.[1]

EVIDENCE—OPINION EVIDENCE — VALUES — QUALIFICATIONS OF EXPERTS. Property owners occupying their property and familiar with land values in the community, who are acquainted with a particular property, are qualified to express an opinion of its value, even if their estimate was higher than sales of other property; and their interest only affects their credibility.

EMINENT DOMAIN — COMPENSATION — EVIDENCE—SUFFICIENCY. A finding that a building condemned was worth $1,000, when the experts' highest estimate was $750 to $800, does not show that the jury was prejudiced, considering the character, condition and uses to which it might be put and the fact that it would cost $1,285 to replace it.

EMINENT DOMAIN—PROCEEDINGS—VIEW. Rem. & Bal. Code, § 344, making it discretionary with the court to order a view of premises, applies to condemnation proceedings.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered December 11, 1911, upon the verdict of a jury awarding damages in condemnation proceedings. Affirmed.

George D. Greene and *Coleman & Gable*, for appellant.

Thomas Smith, for respondents Lederle Heirs.

Hurd & Hilen, for respondents Stromberg *et al.*

MOUNT, J.—This action was brought by plaintiff to condemn certain property for street purposes in Sedro-Woolley, a city of the third class, in Skagit county. After an adjudication of public use and necessity, the value of the property taken was tried to the court and a jury. A verdict was returned fixing the value of the several pieces of property sought to be taken, and a judgment was entered in favor

[1]Reported in 129 Pac. 372.

of the defendants for the amounts found. The city has appealed.

After the appeal was taken, the defendant Joseph Lederle died. Rose L. Willard, the administratrix of his estate and guardian *ad litem* of the minor defendants, has been substituted as respondent. A large number of assignments of error are made in the brief. The first fifteen of these assignments are to the effect that certain witnesses for the respondents were not qualified to express an opinion of the value of the property. Each one of these witnesses, however, stated that he was acquainted with the particular property and knew its value. They placed the value at a higher figure than sales of other property in that vicinity had been made for, but that of itself did not make their testimony incompetent. They testified that values had materially appreciated since such sales.

In *Port Townsend Southern R. Co. v. Nolan*, 48 Wash. 382, 93 Pac. 528, we said: "The owner who occupies his property and is familiar with its character and the purposes for which it may be used, and to a greater or less extent with land values in the community, is a competent witness." The testimony of the witnesses complained of was competent under this rule. The fact that they were interested in the property was a circumstance to be considered by the jury as affecting their credibility.

It is argued that the highest value placed upon a certain building was $750 to $800, and the jury found this building to be worth $1,000; and it is contended that the jury was therefore prejudiced. We think there was evidence tending to show that the building was worth about $1,200. But if the estimate of the witnesses placed the value at the figure stated, we think this does not necessarily show prejudice, because the character, condition, and uses to which the building might be put were all items which the jury had a right to consider; and when it was shown that it would cost $1,285

to replace it, we cannot say that the jury was actuated by prejudice.

It is also argued that it was error to send the jury to view the premises, and that the court erred in instructing the jury upon that question. The statute permits such view within the discretion of the court. Rem. & Bal. Code, § 344. And it has been held that this section applies to condemnation cases. *Bellingham Bay & B. C. R. Co. v. Strand*, 4 Wash. 311, 30 Pac. 144; *In re Jackson Street*, 47 Wash. 248, 91 Pac. 970. An instruction complained of was copied from the case of *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864, where it was approved. The other assignments of error do not require further notice.

There was no error in the record, and the judgment is affirmed.

MAIN, ELLIS, FULLERTON, and MORRIS, JJ., concur.

[No. 10459. Department One. January 24, 1913.]

R. E. DEKAY *et al.*, *Respondents*, v. NORTH YAKIMA & VALLEY RAILWAY COMPANY, *Appellant*.[1]

EMINENT DOMAIN—RIGHT TO COMPENSATION—OPERATION OF RAILROAD—DAMNUM ABSQUE INJURIA. Noises, and the jarring of buildings and the casting of smoke and cinders on adjacent property, necessarily incident to the operation of a spur track on a railroad company's land, and the alley abutting thereon under license from the city, is *damnum absque injuria*, and not a taking or damaging of the adjacent property.

SAME—PUBLIC USE—COMMERCIAL SIDE TRACKS—PRIVATE WAREHOUSE. In such case, it is immaterial that the city license to use the spur track was limited to the purpose of serving a commercial warehouse on private property, in view of Laws of 1911, p. 548, § 13, giving the right to maintain spurs for the use of a private shipper.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered October 30, 1911, in favor of the

[1]Reported in 129 Pac. 574.

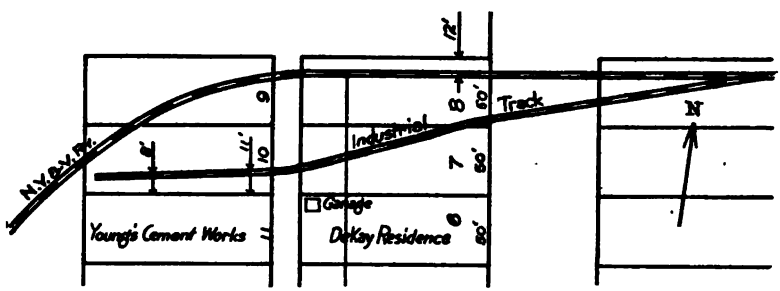
plaintiffs, after a trial on the merits before the court without a jury, in an action to enjoin the maintenance and use of a railway track. Reversed.

Englehart & Rigg, for appellant.

Holden & Shumate, for respondents.

PARKER, J.—The plaintiffs seek an injunction restraining the defendant from maintaining and using a spur track on its line of railway near their residence in the city of North Yakima, until such time as the defendant shall acquire, as against the plaintiffs, the right to so maintain and use such spur track by eminent domain proceedings. From a decree in favor of the plaintiffs, the defendant has appealed.

The accompanying plat, which is a portion of one introduced in evidence, will aid in a correct understanding of the facts:



Respondents own lot six, on which they maintain their residence, and also a garage, on the northwest corner thereof. Appellant owns lots 7, 8, 9 and 10, on which it maintains its railway, and also a spur track, called "industrial track." Benjamin Young owns lot 11, on which he maintains a manufacturing plant and a warehouse contiguous to appellant's industrial track. In June, 1911, when appellant commenced the construction of its industrial track upon the line indicated on the plat, respondents commenced this action. While they prayed for a temporary injunction, we assume, from

the record before us, that none was issued. In any event, the industrial track was constructed some time before the trial of the cause upon the merits, which occurred in October, 1911. This track is used for a team track, at least as far as the alley, beyond which it appears to be used only for shipments to and from Young's warehouse. Before the trial, appellant had acquired from the city of North Yakima a franchise giving it the right to construct its industrial track across the alley, which franchise provided: "that said track shall only be used to serve the warehouse to be constructed and maintained on lot 11." This track is about nine feet from the northwest corner of respondents' lot, about 35 feet from the north line of their lot at its middle point, and about 50 feet from the northeast corner of their lot. Where the track crosses the alley, there is maintained a good plank crossing, so that travel through the alley is not interfered with in the least, except while cars or engines may be crossing the alley.

Respondents rest their right to have appellant restrained from maintaining and using its industrial track in such close proximity to their property, until it acquires the right so to do as against them by eminent domain proceedings, upon the damage which they allege results to their property from the smoke, fumes and cinders emitted and cast upon their property from engines running upon the track, and also from noise and vibration caused by the running of cars and engines upon the track. The nature and extent of this alleged damage is told in the testimony of respondent R. E. DeKay, as follows:

"Q. Now, can you state what effect the running of trains on this spur track has on your property with reference to smoke? . . . A. Why, we get smoke whenever they come in and the wind is right. Q. About how much smoke, Mr. DeKay? A. It is pretty hard to state. It varies in the amount according to how hard they work getting out. Q. Where are your bedrooms situated in this house? A. They are on the north side of the house. Q. Have you ever

opened your bedroom window when a train was on that spur track, an engine? A. Why, we have them open, as a rule, all the time. Q. State to the court what the effect was with the window open. A. I think it was Tuesday or Wednesday night my wife and I were in the room, sitting there, when the switch engine came in. There was enough smoke came in to fill the bedroom with smoke. . . . Q. Now, when did you say that was? A. Tuesday or Wednesday night, this week. Q. Have you noticed inconveniences from smoke on other occasions, Mr. DeKay? A. Yes, sir. Q. State what the facts are with reference to cinders. A. Well, there is more or less cinders. Of course we haven't noticed them so much as we have the smoke. They, as a rule, light on the ground or on the roof; considerable soot comes out with the smoke. Q. Have you noticed any soot in the rooms in your house? A. No, I don't know as I have. Q. Have you noticed any soot on the porch? A. Yes, I have noticed it around on the walks and clothes . . . Q. You do some washing out home, do you, Mr. DeKay? A. Yes, some. Q. And hang it out on a line in the rear of the lot? A. Yes. Q. State what effect smoke and cinders have on the clothing. A. Well, I haven't noticed the effect, except that I have seen them on the clothes . . . Q. Now, do they run trains in there at night? A. As a rule most of their switching is done nights. Q. What effect does that have upon you? A. Why, the noise wakes us up, as a rule, every time they come in. Q. Have you noticed any jarring or vibration? A. Yes, sir. Q. To what extent have you noticed vibration, Mr. DeKay? A. Well, three or four occasions in the last month I have noticed it enough to jar the window sills. That is a sign the house is well built. If it was a less substantial character there would have been more of it. Q. Now, what effect, if any, does the noise at night have upon you and your family? A. As a rule, it wakes all of us up. Q. About how often do they run trains in there, Mr. DeKay? A. Most every day; most every night."

Respondent Gertrude DeKay testified in part as follows:

"Q. Now, you may state what effect the running of trains has upon you and your property with reference to smoke. . . . A. Why, if the wind is toward the house the house is filled with smoke. A good deal depends upon the weather

and the prevailing winds. Q. Well, what are the prevailing winds, Mrs. DeKay? A. Usually from the northwest. Q. That would have the effect, then, of driving the smoke towards your property? A. In our bedroom windows, in our north windows. Q. You say your bedroom windows open to the north next to the track? A. Yes, all of our sleeping rooms open to the north. Q. Can you recall any particular time, Mrs. McKay, when you especially noticed smoke in your bedroom? A. Well, we heard the train coming—we sat at the window especially to notice so as to be sure just how the smoke came, and it came directly, was wafted into our bedroom window and filled our room full of black smoke; not only that room, but our dining room and the parlor was filled. Q. Now, Mrs. DeKay, state what the facts are from the running of trains, what effect it has with reference to soot. A. Well, any clothing that is out—the porches are covered with fine soot, the window sills, and so forth; any clothing that is on the line is covered with soot. Q. State whether or not there is any soot found in your rooms. A. Yes, sir; in dusting I notice it every day. Q. Now, what effect does the running of trains on the spur track have with reference to vibration? A. Well, the house vibrates, the windows shake, and we can notice it at night when we are lying in bed; we can notice the bed shake. Q. Do you notice any inconvenience from noises? A. Yes, sir."

We find no evidence in the record indicating any different or greater damage resulting to the property of respondents from the use of the industrial track than that shown by this testimony of the respondents. There is, however, some testimony of real estate men, showing the property to have a somewhat less market value because of the construction and use of the industrial track.

It is evident, from the prayer of the complaint and the argument of counsel for respondents, that they are not proceeding upon the theory that the use of appellant's industrial track is attended by any negligence, nor that its operation creates a nuisance; but that appellant may acquire the right to so cause such damages, as against respondents, by

eminent domain proceedings. They invoke the provision of § 16, art. 1, of our state constitution, which reads:

"No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner."

The question of the correct construction of this provision, in so far as there is involved the nature of the damage which is required to be compensated for, was given consideration and exhaustively reviewed by this court in *Smith v. St. Paul, Minn. & M. R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. 889, 70 L. R. A. 1018. At pages 360, 362, we said:

"Applying to the constitutional provision in question the usual tests and rules, and having due consideration for the weight of judicial opinion, as we find it expressed by the courts that have passed upon this question, we are disposed to hold that the word 'damaged,' as used in our constitution does not give a right of action in a case where the injuries would have been, in the absence of said word, *damnum absque injuria* in an action against a natural person or private corporation. It would seem to be only reasonable to suppose that persons acquiring property in a thickly settled community must have anticipated the use of neighboring property in a manner not always to be agreeable and pleasant. A person buying property in a growing city must be presumed to have done so for the benefits to come to him by reason of being a property owner in such a city. The presence and operation of railroads are necessarily attendant upon the growth and prosperity of such a city as Spokane. Probably respondents would not have become property owners therein had it not been for the present and prospective railroad facilities of the city. As such purchasers and owners, they knew that more railways would be required as the city grew and became more important. The very growth and development which made city property, as a whole, more valuable, and opportunities for business prosperity greater, required the building and operation of more railway lines. No one could buy property in such a growing city without realizing that this would be a natural and necessary result. Where such new lines might be constructed, a person could not foretell. But he would know that they must be near other prop-

erty, and that their operation, however legitimate and careful, must entail consequential injuries upon the owners of such nearby property. Electing to purchase property in such a community where his property might profit by the industrial and commercial activities of others, it is but just to hold that, with the advantages, he should also accept the burdens necessarily incidental thereto. . . . The ringing of bells, sounding of whistles, rumbling of trains, and other usual noises, and the emission of smoke, gases, fumes, and odors are necessarily incidental to the proper operation of the road, and when not resulting from negligence, are such consequential injuries as must be held to have been anticipated by any one acquiring property in or about such a city, and are regarded as *damnum absque injuria.*"

The nature of the alleged damage there involved, aside from the question of negligence, was the same as that here involved. If it differed in degree, it was only because the track of the railway was not so near to the property claimed to be damaged as in this case. In both cases the track was maintained upon property belonging to the railway company, except in so far as the alley here involved is concerned. The doctrine of that case was reaffirmed in *Clute v. North Yakima & Valley R. Co.*, 62 Wash. 531, 114 Pac. 513. Except in so far as the alley crossing is concerned, it seems to us those decisions effectually dispose of the case in favor of appellant. The mere difference in the degree of injury resulting from the operation of the railway does not affect the principle involved. Difference of damages in kind, or damages flowing from negligence on the part of appellant, would present a different question.

Some contention is made by counsel for respondents rested upon the provision of the franchise restricting the use of the alley crossing to the service of the warehouse, the argument being that this is a grant for a private purpose and is therefore void. It is manifest that respondents have no such special property interest in that portion of the alley upon which the crossing is situated as they have in that portion

of the alley upon which their lot directly abuts. *In re Fifth Avenue etc.*, 62 Wash. 218, 113 Pac. 762; *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886. The maintaining and use of a railway track in that portion of the alley upon which respondents' lot abuts would probably give them some ground for relief under our holding in *Lund v. Idaho & Wash. N. R.*, 50 Wash. 574, 97 Pac. 665, 126 Am. St. 916, but clearly that is not the question before us. In view of the close proximity of the crossing of the alley to respondents' lot, they possibly have the right to have the track so constructed across the alley at this point that the usual travel through the alley will not be obstructed or interfered with; but we are unable to see that their rights go beyond this, in any event. This being true, it may be well doubted that respondents are in any position to challenge the validity of the franchise ordinance. Indeed, it may well be doubted whether they would have any right to challenge the appellant's right to maintain this crossing, even though it were being maintained under a license created merely by sufferance on the part of the city. But, however that may be, it seems plain, under Laws 1911, p. 548, § 13, being a part of our public service commission law, that the railway company has the right to maintain such a track by consent of the city, even though it be maintained for the exclusive use of a private shipper. There is, however, nothing in this franchise ordinance which indicates that this warehouse is to be a private warehouse for the accommodation of its owner alone as a shipper. Indeed, there is evidence in the record indicating that it is intended to be a warehouse for the use of the public.

We are of the opinion that the judgment of the learned superior court must be reversed and the action dismissed. It is so ordered.

CROW, C. J., CHADWICK, GOSE, and MOUNT, JJ., concur.

[No. 10602. Department One. January 24, 1913.]

P. Peterson *et al.*, *Respondents*, v. J. J. Nichols, *Appellant*.[1]

Contribution—Actions—Evidence—Admissibility. Upon a defense of breach of warranty and failure of consideration for a note, in an action for contribution by part of the makers who had paid the note to a bank as a holder in due course, it is error to exclude evidence that the bank had acted only as a collecting agent in prosecuting the suit on the note, as it tended to show that it was not a holder in due course, and that the defense of breach of warranty was available.

Same—Evidence—Admissibility—Burden of Proof. In such case, the proof of the warranty and breach was admissible in defense, and would cast the burden on plaintiffs to show that the bank had been a holder in due course.

Judgment—Conclusiveness—Persons and Matters Concluded. A judgment against part of the makers of a note, obtained by a bank as transferee, is not conclusive on the other makers that the bank was a holder in due course, in a subsequent action against them for contribution.

Contribution—Liability. Contribution against part of the makers of a note cannot be enforced unless the makers who paid the note were under legal obligation to pay it.

Appeal from a judgment of the superior court for Lincoln county, Baske, J., entered December 9, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for contribution. Reversed.

Martin & Wilson, for appellant.

Gose, J.—Suit for contribution. Verdict and judgment for the plaintiffs. The defendant has appealed.

The complaint alleges that, in the month of January, 1907, the respondents, the appellant, and one other person purchased a stallion of one George W. Souers, for which they agreed to pay the sum of $4,000, evidenced by their two joint and several promissory notes in favor of Souers, drawn

[1]Reported in 129 Pac. 873.

for $2,000 each, and due respectively in one and two years; that they agreed to hold the horse in shares, the appellant agreeing to take two shares of the agreed value of $1,000; that they defaulted in the payment of the note last maturing, after the respondents had paid $1,061.35 thereon; that suit was commenced thereon by the Bank of Commerce, a corporation; that a default judgment was entered against the respondents Peterson, Shields, Maurer, and Telford Brothers, for the balance due, with interest, attorney's fees, and costs; that thereafter the respondents paid the judgment in full, and that the appellant paid his part of the first note, amounting to $500, but that he has not paid any part of the last note or of the judgment.

The appellant, for a second affirmative defense, alleged that Souers, the vendor and payee in the notes, in order to induce the makers of the notes to purchase the stallion, warranted that the stallion, with reasonable care, would get in foal sixty per cent of the mares mated with him for a period of two years; that if he did not do so, he would replace the stallion with another of the same breed and price, and that the makers need not pay the note last maturing until they were "satisfied that the stallion . . . was as guaranteed;" that Souers further agreed, as a part of the sale of the stallion, that he would keep him insured for a period of two years from the date of sale, loss, if any, payable to himself; and that, in the event the stallion should die within the two years, he would "replace said stallion with another of the same breed and price;" that they took reasonable care of the horse, and that he did not get more than thirty per cent of the mares in foal that were mated with him; that the stallion died a natural death in the fall of 1908; that Souers was at once notified of his death and requested to replace him conformably to his guaranty, but that he refused so to do.

The appellant testified, that he was the manager of the company that purchased the horse; that the horse was guaranteed, and that he died within the two-year period; and then

offered to prove the terms and breach of the guaranty. Objections were sustained to the offer unless he could prove, (a) that the Bank of Commerce had notice of the infirmity in the note, or (b) that the respondents, at the time they paid the judgment, knew that the consideration for the note had failed. The appellant then offered to read a deposition in evidence, which tended to show that the Bank of Commerce acted only in the capacity of a collecting agent in the prosecution of the suit. An objection that it was irrelevant and immaterial was sustained.

The court erred in not admitting the deposition in evidence. It had a slight tendency to prove that the Bank of Commerce was not a holder of the note in due course. The appellant should have been permitted to offer testimony tending to prove the terms of the guaranty and their breach. The burden would have then devolved upon respondents to prove that the Bank of Commerce was a holder in due course. *National Bank of Commerce v. Drewry*, 70 Wash. 577, 127 Pac. 102; *City Nat. Bank of Lafayette v. Mason*, 58 Wash. 492, 108 Pac. 1071; *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801. The bank had no judgment against the appellant. Its judgment against the respondents does not conclude the appellant on the question as to whether the bank was a holder in due course.

"The right to contribution arises from the payment of more than one's share of a common liability, and rests upon an implied promise not declared on or made an issue in the suit of the creditor against the common debtors." *Hoxie v. Farmers' & Mechanics' Nat. Bank*, 20 Tex. Civ. App. 462, 49 S. W. 687.

The party from whom contribution is demanded must have been under a legal obligation to pay at the time the payment was made by those who demand the contribution. *Stockmeyer v. Oertling*, 35 La. Ann. 467; *Andrews v. Murray*, 33 Barb. 354; *Turner's Adm'r v. Thom*, 89 Va. 745, 17 S. E. 323. The pleadings are silent as to how the bank got the note.

We have not been favored with the respondents' view of the case, as they have not filed a brief. We think, however, that the court erred in the matters mentioned.

The judgment is reversed, with directions to grant a new trial.

CROW, C. J., CHADWICK, PARKER, and MOUNT, JJ., concur.

[No. 10585. Department One. January 24, 1913.]

BARNARD MANUFACTURING COMPANY, *Appellant*, v. RALSTON MILLING COMPANY *et al.*, *Respondents*.[1]

CORPORATIONS — INSOLVENCY — RECEIVERS—GROUNDS FOR APPOINTMENT — MISREPRESENTATIONS BY STOCKHOLDER — COMPLAINT—SUFFICIENCY. A complaint states a cause of action for the appointment of a receiver of an insolvent corporation and the collection of unpaid stock subscriptions, where it alleges that the defendant stockholders induced the plaintiff to extend credit to it by falsely representing that its capital stock of $25,000 was fully paid up, when not to exceed $13,200 thereof had been subscribed, that defendants diverted and appropriated the capital stock, and that the corporation was insolvent, and a return of *nulla bona* had been made in another suit.

CORPORATIONS—OFFICERS AND STOCKHOLDERS—LIABILITY. Stockholders who induced the extension of credit to an insolvent corporation by false representations as to the amount of stock subscribed are liable for the loss to the extent that the represented stock exceeds the amount actually subscribed.

CORPORATIONS—CAPITAL STOCK—TRUST FUND—APPROPRIATION. The assets of a corporation being a trust fund for creditors, its capital stock can be reduced only in the manner provided by statute; and persons appropriating the same are liable therefor.

CORPORATIONS—INSOLVENCY—PRIMA FACIE PROOF. The insolvency of a corporation is *prima facie* shown, under Rem. & Bal. Code, § 3715, by failure to pay its annual license fee for one year after due date.

SAME—NULLA BONA. The insolvency of a corporation is shown by judgment and return of *nulla bona* at the suit of a third party.

[1]Reported in 129 Pac. 389.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS. A judgment creditor of an insolvent corporation may maintain an action against stockholders, where there is a prayer for a receiver and general relief.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—FRAUD. Rem. & Bal. Code, §§ 3677 and 3698, measuring and limiting the liability of stockholders in a corporation, do not protect a stockholder from the consequences of fraudulent representations inducing the extension of credit to the corporation when insolvent.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered January 6, 1912, upon sustaining demurrers to the complaint, dismissing an action for the appointment of a receiver of an insolvent corporation. Reversed.

Belden & Losey and *John M. Cannon*, for appellant.

Adams & Naef, for respondents.

GOSE, J.—Demurrers were sustained to the plaintiff's second amended complaint. Upon its election to stand upon its pleading, a judgment was entered in favor of the defendants. The plaintiff has appealed.

The complaint is long, and contains some conflicting averments. But the essential features may be thus epitomized: After alleging the incorporation of the appellant and the payment to the state of its last annual license fee, it alleges that the Ralston Milling Company has held itself out to the public and to the appellant as a legally organized corporation with a subscribed and paid-up capital of $25,000; that the individual respondents, since the 5th day of May, 1908, have represented to the public and to the appellant that the milling company was a corporation organized to conduct an elevator and milling business, and that it had a capital stock of $25,000, "fully subscribed in good faith;" that it had kept its license fees paid; that the appellant believed and relied thereon, and had no knowledge to the contrary; that not to exceed $13,200 of its capital stock has been subscribed, the major portion of which has not been paid, all

of which the respondents knew; that the corporation, through its officers and managers, since the 5th day of May, 1908, has purchased from the appellant goods, wares and merchandise, upon which there remains a balance unpaid of $861.33, and that the appellant would not have extended the credit had it not believed the representations of the respondents to the effect that $25,000 capital stock had been subscribed.

It is further alleged that the respondents, "and each of them, have wasted, appropriated to their own use, secreted, or fraudulently transferred all of the regularly subscribed capital stock" of the corporation, and all the proceeds thereof, with intent to defraud the appellant "and others"; that the respondents all assert that the corporation is insolvent, and that it has not paid its license fee to the state for the years 1910 and 1911. It is further alleged that, upon a judgment entered in another case against the corporation, an execution was issued, and a return of *nulla bona* was made a few days before the commencement of the action. The prayer is for a judgment against the corporation, for the appointment of a receiver empowered to recover any property of the milling company that may have been transferred in fraud of creditors, requiring the receiver to collect all sums due the corporation on stock subscription, "and requiring defendants and each of them to pay, or cause to be paid, to said receiver for the benefit of the plaintiff and other creditors of said corporation the sum of $11,800, or so much thereof as shall be required to pay all indebtedness of said corporation and the costs of said receivership, the same to be paid in such proportion by said defendants as to the court may seem just and equitable;" and for general relief. The respondents Clodius, Berry and Mueller joined in one general demurrer to the complaint, and the respondents V. T. Donnell, B. B. Gillispie, E. H. Herring, F. Albershardt, J. A. Helm and W. C. Reeder joined in another general demurrer.

We think the complaint states a cause of action against

both demurrers. It charges, in effect, that the individual respondents induced the appellant to extend credit to the corporation by representing to it that the corporation had a subscribed capital stock of $25,000, when in truth and fact, as they each knew, not to exceed $13,200 had been subscribed; that there is a balance due to appellant from the milling company, and that the corporation is insolvent.

A stockholder or officer of a corporation is no more immune for his false representations which result in a loss to one who relied upon the representations than any other individual. In other words, the rules of common honesty and common sense apply alike to all persons, without regard to the capacity in which they act. If the charges are true, the appellant has suffered a loss because it relied upon the respondents' representations as to material facts, which representations were false and known to be false when made. This view is elementary and would seem to require no sustaining authority. In *Schley v. Dixon*, 24 Ga. 273, 71 Am. Dec. 121, it was held that it was a legal fraud for trustees of a corporation to make false official reports which prejudiced the rights of the creditors of the corporation. See, also, *Hequembourg v. Edwards*, 155 Mo. 514, 56 S. W. 490; *Burns v. Beck*, 83 Ga. 471, 10 S. E. 121. If the several respondents represented that $25,000 capital stock had been subscribed, and credit was extended on these representations and a loss resulted, there would seem no reason in law or equity why they should not be held to make these representations good to the extent of the loss; provided the loss does not exceed the difference between the capital stock subscribed and the amount which they represented had been subscribed.

The complaint is also sustainable on another ground. It charges that the respondents diverted and appropriated the capital stock of the corporation. The capital stock of a corporation can only be reduced in the manner provided by statute. Rem. & Bal. Code, §§ 3697, 3698; *Carstens &*

Earles v. Hofius, 44 Wash. 456, 87 Pac. 631; *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364; *Tacoma Ledger Co. v. Western Home Building Ass'n*, 37 Wash. 467, 79 Pac. 992. In the case last cited, it is said:

"And it is held a fraud on the creditors for the stockholders to withdraw the assets of the corporation leaving debts of the corporation unpaid."

In the *Hofius* case, the court said:

"No more will equity require a creditor to waive his right to recover upon the obligation of a trustee who has permitted all the tangible assets of a corporation to be absorbed by another, in the proceeds of which he has shared."

This rule rests upon the principle that the assets of a corporation are a trust fund for the payment of its debts. *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. 810; *Tacoma Ledger Co. v. Western Home Building Ass'n*, *supra*. It has been held that a director of a corporation, who converts its property or diverts it to purposes other than corporate purposes, is liable for the value of the property so converted or diverted. *Potvin v. Denny Hotel Co.*, 26 Wash. 309, 66 Pac. 376; *Mitchell v. Jordan*, 36 Wash. 645, 79 Pac. 311.

The statute provides that the failure of a corporation to pay its annual license fee for the period of one year after its due date is *prima facie* evidence of its insolvency. Rem. & Bal. Code, § 3715. Again, the allegation that a judgment has been entered against the corporation at the suit of a third party and that an execution issued thereon has been returned unsatisfied, in itself shows the insolvency of the corporation. This court has held that a judgment creditor of an insolvent corporation may maintain an action against the stockholders for their unpaid subscription. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807.

The complaint charges that like misrepresentations were made to other creditors. The prayer for general relief and

for payment through a receiver will protect the respondents and bring the case within the rule applied in *Dunlap v. Rauch, supra.*

It is said that the learned trial court sustained the demurrers upon the authority of *American Radiator Co. v. Kinnear*, 56 Wash. 210, 105 Pac. 630, 35 L. R. A. (N. S.) 453. In that case the only fraud asserted was that the corporation commenced and transacted business before all its capital stock had been subscribed. It was held that that fact did not render the officers and trustees liable. The code, Rem. & Bal., §§ 3677 and 3698, is also relied upon as measuring and limiting the liability of stockholders in a corporation. These sections deal only with their contractual relations. The legislature did not intend to, and has not, exempted a stockholder in a corporation from liability, when by his actual misrepresentations as to the capital stock of the corporation he has induced a third party to extend it a credit which it would not otherwise have given it, and has suffered a loss in so doing. In short, there was no intention to protect a stockholder against his own fraudulent acts.

The judgment is reversed, with directions to proceed in conformity with this opinion.

Crow, C. J., Chadwick, Parker, and Mount, JJ., concur.

[No. 10572. Department One. January 25, 1913.]

FERDINAND J. CLIFFORD, *Respondent*, v. PATEROS TRANSFER COMPANY, *Appellant*.[1]

PROCESS—SERVICE BY PUBLICATION — JUDGMENT IN REM—EXECUTION—PROPERTY SUBJECT—JUSTICE OF THE PEACE—JUDGMENT. Rem. & Bal. Code, § 1766, providing that in case personal service cannot be had in a justice court action, by reason of the absence of the defendant from the county in which the action is commenced, service may be had by publication of the summons, authorizes only a judgment *in rem* against the property attached, even if the defendant was a resident of the state; and where the attached property is not sufficient to satisfy the judgment, no other execution can issue against other property of the defendant as in the case of personal judgments.

EXECUTION—PROPERTY SUBJECT—ATTACHMENT—GENERAL EXECUTION FOR DEFICIENCY. Rem. & Bal. Code, § 668, providing that if the proceeds of attached property are insufficient to satisfy the judgment, the sheriff shall proceed to collect the balance as upon an execution in other cases, applies only where a personal judgment has been rendered which can be satisfied by general execution.

ATTACHMENT — NATURE — PROCESS—PROCEEDING IN REM. An attachment is an ancillary proceeding only in cases where jurisdiction of the person is acquired in the main action; and in cases of service by publication the jurisdiction extends only to the property attached.

Appeal from a judgment of the superior court for Okanogan county, Pendergast, J., entered January 24, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for conversion. Affirmed.

Chas. T. Borg and *Chas. R. Sargent*, for appellant.

Peter McPherson, for respondent.

PARKER, J.—This is an action to recover damages which the plaintiff alleges resulted to him from the seizure and sale of certain of his personal property by a constable of Okanogan county, under an execution issued at the instance of this defendant upon a void judgment rendered in its favor against

[1]Reported in 129 Pac. 369.

the plaintiff, in a justice court of that county. From a verdict and judgment in favor of the plaintiff, the defendant has appealed.

The assignments of error present the single question, Was the judgment rendered in the justice court against respondent, under which appellant caused the seizure and sale of the property of respondent, a valid personal judgment against him, authorizing the seizure and sale of his property in satisfaction thereof, other than his property which was seized by attachment in the action prior to the rendition of the judgment? The facts determinative of this question are not in dispute, and may be briefly stated as follows: In March, 1910, appellant commenced an action against respondent in a justice court of Okanogan county, to recover money due for the care and feed of a team of horses. Appellant caused to be issued a writ of attachment in that action, upon the ground "that defendant (this plaintiff) has absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be served upon him." By authority of this writ, a constable of that county levied upon and seized certain personal property of the respondent, and held the same pending the action. Because of respondent's absence from the county, summons in the action was duly served upon him by publication only. Thereafter, respondent not appearing in the action, judgment was rendered against him as prayed for, in the sum of $95.65 and costs. Thereafter execution was issued upon the judgment in usual form, as though the judgment were personal and had been rendered upon personal service of summons. The attached property not being sufficient to satisfy the judgment in full, acting under this execution at the instance of appellant, the constable levied upon and seized other personal property of respondent and sold the same, together with the attached property, to satisfy the judgment. During the pendency of the action in the justice court and until after the seizure and sale of his property under the execution, respondent

was a resident of Okanogan county, but was then absent therefrom in Spokane county.

Counsel for appellant concede the general rule to be that service of summons by publication only, upon a defendant while absent from the territorial jurisdiction of the court from which such summons issues, will not support a personal judgment against such defendant, nor subject any of his personal property to the satisfaction of a judgment rendered upon such service, except such property as has been previously levied upon by attachment or other proper process in the action. Counsel rely, however, upon the provisions of our statute, which they insist render a judgment based upon service by publication sufficient authority to levy upon and subject to its satisfaction any property of the defendant which may be found within the territorial jurisdiction of the court, even though the judgment may not be, in its broadest sense, personal against the defendant. Our attention is called to Rem. & Bal. Code, § 1766, which provides:

"In case personal service cannot be had by reason of the absence of the defendant from the county in which action is sought to be commenced, it shall be proper to publish the summons or notice, with a brief statement of the object and prayer of the claim or complaint, in some weekly newspaper published in the county wherein the action is commenced; or if there is no paper published in such county then in some newspaper published in the nearest adjoining county, which notice shall be published not less than once a week for three weeks prior to the time fixed for the hearing of the cause, which shall not be less than four weeks from the first publication of said notice. Said notice may be substantially as follows:" Then follows form.

There is no specific language in this provision, or elsewhere in our statutes, connecting it in any way with the provisions of our statutes relating to attachment, nor indicating the effect of the judgment which may be rendered upon such a service; and if it were not for the general rule that such a service will not support a personal judgment, there

might be some warrant for concluding that this provision expressed a legislative intent that a judgment based upon such service should have some force and effect beyond that of a judgment *in rem* against property attached in the action prior to the rendering thereof. Our attention is also called to Rem. & Bal. Code, § 668, which provides:

"If, after selling all the property attached by him [sheriff or constable] remaining in his hands, and applying the proceeds, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases."

It seems plain to us, however, that this provision can have no effect upon the force or effect of the judgment. It is merely a provision prescribing the manner in which the judgment shall be satisfied; and, of course, if it is not such a judgment as may be satisfied by general execution, this provision is of no effect.

It will be of aid in arriving at a correct interpretation of § 1766, above quoted, to notice the general rule touching the force and effect of a judgment rendered upon service by publication only, and the reason upon which it rests. Probably the leading decision in this country upon this subject is that rendered by the supreme court of the United States in *Pennoyer v. Neff*, 95 U. S. 714, wherein there was involved the validity of a judgment of a state court of Oregon, rendered upon service by publication, in so far as there was an attempt to subject the property of the defendant to the satisfaction thereof which was not brought under the control or custody of the court by attachment or other process prior to the rendition of the judgment, the defendant being a nonresident of the state. At page 726, Justice Field, speaking for the court, said:

"If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which in the great majority of cases, would never be seen by the parties interested,

could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished. Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability. The want of authority of the tribunals of a state to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below; but the position is assumed, that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satis-

faction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none."

In that case the court was dealing only with a judgment against a nonresident of the state, and it is insisted that this distinguishes the problem there involved from that here involved. But the first part of the remarks of Justice Field above quoted clearly indicates that the rule would apply equally to any defendant whose absence prevented the usual personal service of summons upon him. Unless there can be recognized some sound distinction in principle between actions against nonresidents and actions against residents, the doctrine of this famous decision would seem to be controlling in respondent's favor here. If, under such a judgment and service, a nonresident's property, other than that which is attached in the action prior to the rendition of the judgment, cannot be subjected to the satisfaction thereof, it must be because his rights are superior to the rights of a resident, based upon the mere difference in residence of such defendants. We are clearly of the opinion that there is no such distinction in principle, and that the force and effect of a judgment rendered upon such service is not in the least affected by the place of residence of the one against whom it is rendered. It is the difference between personal and substituted service, there being no appearance by the defendant in the action, which renders the judgment personal or *in rem*.

In *Paxton v. Daniell*, 1 Wash. 19, 23 Pac. 441, this court followed the law as announced in *Pennoyer v. Neff*.

While apparently conceding that the law is as we have indicated, counsel for appellant contend, in substance, that it is the presence within the territorial jurisdiction of the court of the property of the defendant that gives the court jurisdiction to reach such property in the satisfaction of the judgment, rather than the seizure of property of the defendant by attachment or other process before the rendering of the judgment. This contention seems also to be effectually answered by the latter part of Justice Field's remarks above quoted. To meet this view of the general rule, counsel insists that § 1766, above quoted, does not limit the effect of the judgment which may be rendered upon service by publication, and argues that such judgment must, therefore, at least be given force and effect to the extent of reaching all property within the territorial jurisdiction of the court, whether levied upon by attachment prior thereto or not, though the judgment may not, in its broadest sense, be personal so as to be effectual as such beyond the court's territorial jurisdiction in a proper proceeding there instituted to make it so effective. In *Pennoyer v. Neff*, at page 720, it is said:

"The code of Oregon provides for such service when an action is brought against a non-resident and absent defendant, who has property within the state. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the state, 'unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached.' "

This latter provision would seem to furnish some ground for contending that jurisdiction over the property depended only upon its presence within the territorial jurisdiction of the court, rather than upon its seizure by attachment prior

to judgment; yet the decision in that case was directly to the contrary. Our attention has not been called to any such provision in our statutes, and we know of none; hence it seems to us there is here even less ground for such a contention than there was in that case. It seems to us that appellant's contention upon this question rests entirely upon the provisions of § 1766, which relate only to the authorization of, and manner of, service of summons by publication. In view of the firmly established rule, as announced in *Pennoyer v. Neff* and followed by this court, we are constrained to hold that it was not the legislative intent, by the provisions of § 1766, to give effect to a judgment rendered upon such service, beyond that of a proceeding *in rem* against such property of the defendant as may be actually levied upon and seized by attachment or other appropriate process prior to the rendering of the judgment in the case. Had our statutes made some special provision to the contrary, it seems probable that there would be here presented a grave constitutional problem. We express no opinion upon that subject.

Some contention is made rested upon the general rule that an attachment is a proceeding merely ancillary to the action, for the purpose of acquiring a lien upon property to secure such judgment as may be eventually rendered therein. While this is true in actions where the jurisdiction is obtained by personal service upon the defendant within the court's territorial jurisdiction, it is also true that the attachment is one of the principal prerequisites to the court acquiring jurisdiction in the action where service is had upon the defendant by publication only. In such case, the whole proceeding becomes, in substance, a proceeding *in rem* against the property which has been previously attached and thus brought under the control of the court. In such a case, as said by Justice Field in *Pennoyer v. Neff:*

"The jurisdiction of the court to inquire into and determine his [defendant's] obligations at all is only incidental to its jurisdiction over the property."

In other words, while the attachment is merely incidental to the main action in cases of personal service upon the defendant, in cases of substituted service all other proceedings in the action are incidental to the attachment, so far as the jurisdiction of the court in the particular case is concerned.

Some contention is made rested upon the fact that there was an actual seizure by attachment of some of the property of the defendant prior to the rendering of the judgment. We are quite unable to see, however, that such fact renders any aid whatever to the judgment, in so far as its effect upon other property is concerned. It is still a judgment *in rem* against the property previously attached; nothing more.

The judgment is affirmed.

CROW, C. J., MOUNT, GOSE, and CHADWICK, JJ., concur.

[No. 10619. Department One. January 25, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES P. BENNETT, *Appellant*.[1]

CRIMINAL LAW—TRIAL—MISCONDUCT OF JUROR—SEPARATION—PREJUDICE. Under our statutes, Rem. & Bal. Code, § 2159, requiring jurors in criminal cases to be kept together, except in cases of misdemeanors under Id., § 346, it is reversible error in a felony case for a juror to separate from his fellows, and it is not permissible for him to excuse his conduct and show that no prejudice resulted.

SAME—SEPARATION OF JURY—WAIVER—OBJECTIONS—SUFFICIENCY. A separation of the jurors in a felony case, known to the court and objected to by the defendant at the time, is not waived because the objection or protest was technically insufficient or not put in apt words, and it can thereafter be raised on motion for a new trial.

Appeal from a judgment of the superior court for Ferry county, Bell, J., entered May 17, 1912, upon a trial and conviction of embezzlement. Reversed.

[1]Reported in 129 Pac. 409.

James T. Johnson, *Frank M. Allyn*, and *W. C. Stayt* (*Samuel Porter*, of counsel), for appellant.

John W. Matthews, for respondent.

CHADWICK, J.—The appellant was convicted of the crime of embezzlement, and brings his case here on appeal.

Among the errors assigned, few are possessed of merit. During the progress of the trial and while the jury was passing along the street in charge of two bailiffs, one of the jurors stopped and had some conversation with some bystanders. He then went into a lunch counter which occupied a storeroom with a cigar store, the two being separated by a partition seven feet high, with an open door or archway between the two places. The juror ordered and ate his supper and then went out. The remaining jurors were taken to a hotel, and were there given their supper. The absence of the juror was not immediately noticed. It would seem to us from the record that the juror finished his meal about the time his absence was noted. He was recovered by the bailiff, and from that time on, the jury was kept together. He was away from twenty to thirty minutes and talked with several persons. On the next morning, the matter having come to the notice of the trial judge, the following colloquy ensued:

"The Court: It was reported to the court last evening that one of the jurors in this case separated for a few minutes from the other jurors; I think the juror was Mr. Edberg. Mr. Edberg, did you separate from the other jurors? Mr. Edberg: I did; I didn't understand that the jury was to stay together. The Court: You say you did not understand that the jury was to be kept together? Mr. Edberg: No. The Court: Where did you go after you separated from the jury? Mr. Edberg: Just went into a restaurant and had my supper. The Court: Just went into a restaurant and had your supper? Mr. Edberg: Yes, sir. The Court: Did you talk to any one? Mr. Edberg: No. Mr. Stayt: If your Honor please, we object to this proceeding. The Court: This is on the motion of the Court.

I shall take the privilege of questioning the juror. Did anyone talk to you at that time? Mr. Edberg: No, sir. The Court: Did you speak to any one at all? Mr. Edberg: No, sir. The Court: What did you do, did you eat your supper at the restaurant? Mr. Edberg: Yes, sir. The Court: Then what did you do? Mr. Edberg: Stood out on the steps on the sidewalk and then went down the street to find the other jurors. The Court: Went down the sidewalk to find the other jurors. Mr. Edberg: Yes, sir. The Court: And didn't speak to any one from the time you left the jury until you again met them? Mr. Edberg: No. The Court: I want to instruct all the jurors that they are not to drop out or separate, even though the bailiffs should not see them. Every juror must understand that it is as much his duty to stay with the other jurors as it is the bailiffs' to see that he stays there, and each juror must consider it his duty, and it is your oath, as jurors, that you will remain together and not separate until the case is brought to an issue and you have brought in a verdict. The Court: To defendant's attorneys: If you wish to make any objections, you may do so. Mr. Stayt: We object to the whole procedure, your Honor, and except to the action of the Court. The Court: Exception allowed. Mr. Stayt: I guess we can proceed, your Honor. Judge Neal will resume the stand."

Several of the jurors made affidavit, saying that the juror did not refer to any one who had talked about the case in his presence during his absence, nor did he say that he talked with any one. The offending juror made affidavit exonerating himself from all intentional fault.

It will be seen that the affidavits of the jurors are wholly insufficient to cure the error, if we adhere to the rule that the separation of a juror from the body of the jury in a felony case is reversible error. It is not denied that the case will have to be reversed if the rule laid down by this court in the case of *State v. Place*, 5 Wash. 778, 32 Pac. 736, and *State v. Strodemeir*, 41 Wash. 159, 83 Pac. 22, 111 Am. St. 1012, is followed; but it is contended, (a) that these cases are opposed to the general rule and should be overruled; that the dissenting opinions filed in each of them state the true

rule of practice; (b) that this court has declared a different and a better rule in the case of *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449; and (c) that defendant did not sufficiently reserve an exception to the misconduct of the juror.

While it is true that our decisions, when read in the light of certain texts followed by the citation of adjudged cases, may seem to be out of harmony with that practice which requires a showing of actual prejudice, yet, when viewed in the light of the history of the law and our statute, it seems to us that the cases criticised were correctly decided. Anciently a separation of the jurors was fatal in all cases. This rule was relaxed so that a separation was allowed in all civil cases and latterly in cases of misdemeanors. These distinctions found their way into our statutes, Rem. & Bal. Code, §§ 846, 2159. These statutes, when construed together, are quite as positive as the ancient rule, and the basis for the order of association of the jurors pending the trial is to be found in the statute and not in the order of the court. The *Place* and *Strodemeir* cases were put upon the statute. It may well be that, where the order to keep the jury together is based upon a discretionary order of the court, an appellate court should say, in furtherance of justice, that the case will not be reversed unless prejudice be shown; and so far as we have looked into the authorities holding that an affirmative showing of prejudice must be made, the order was discretionary with the court and did not rest upon a statute. Whatever the rule may be elsewhere, the people of this state have seen fit to say, through the legislative body, that a defendant shall have not only a fair trial, but the semblance of a fair trial, for the reason, no doubt, that the danger of allowing a juror to pass upon his own delinquency would be quite as dangerous as the vice at which the statute is aimed. Any juror who would put himself in a situation where he might seek counsel or be subject to the approach of friends should not be heard to say that he did not intend a wrong, or did not talk upon the subject of the case. If such con-

struction be put upon our statute, it would be shorn of its vitality, for no defendant could ever rebut such a showing or prove a conversation against the will of the participants. It is not so much what may have been done, as what might be done. Our statute furnishes the rule of practice in this state and it must be followed, unless we have decided to the contrary in the later case of *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449. In that case, we said:

"But the claim of error resting exclusively on the theory that some juror might possibly have been subjected to undue influence, the assignment, under the great weight of authority, cannot be sustained."

It was upon the authority of this case, as we understand, that the lower court denied the motion for a new trial. While inclined to follow, in all proper cases, the logic, if not the rhetoric, of the case just cited, it must be remembered that the act here complained of was not violative of the statute, but was within the bound of its permissive limitations. In the absence of a statute, prejudice will not be presumed. This is the holding in the *Pepoon* case; but where the statute says thou shalt or thou shalt not, a presumption of prejudice follows, and such was the rule in the *Place*, *Strodemeir*, and the cases hereinafter referred to.

Finally, it is contended that, conceding the act of the juror to have been error, appellant must be held to have waived his advantage. If it were a matter of practice only, we would not hesitate to hold that the error was waived; but as we have seen, it was not a breach of a mere rule of practice or a discretionary order of the court, but a violation of the substantive law of our commonwealth. It was enough that the court knew of the misconduct of the juror and that the defendant objected thereto. Neither the burden nor the benefit of a statute depends upon the will of the individual. *Linbeck v. State*, 1 Wash. 336, 25 Pac. 452; *State v. Myers*, 8 Wash. 177, 35 Pac. 580. Statutes are the expression of the will of society, and to hold that an accused party should

lose the benefit of a protective statute because his objection or protest is technically insufficient, or is not put in apt words or phrase, would be to deny its benefit in many cases. Moreover, the subject was introduced by the court and passed upon by him without suggestion or assistance of counsel. It is enough that the question was before the court at the time of the trial. It was then the duty of counsel to proceed as ordered by the court, for his right to urge the question upon motion for a new trial or upon appeal remained.

Other errors, going to the instructions given and refused, are urged. It will serve no purpose to review these assignments singly. The instructions as given generally state the law. In one or two it may seem that the court assumes disputed facts to have been proven, and in one or two instances we think the instructions do not have the sustaining grace of evidence to support them; but we will assume that, in the event of a new trial, the court will prepare his instructions to meet the case as then presented. The instructions can be very materially simplified. There is but one issue. Defendant was the administrator of an estate. Upon the rendition and approval of the final account, the court found that he had in his possession moneys and properties belonging to the estate. He failed to pay over or distribute the trust funds upon demand. The only question of law, therefore, is whether he is guilty of embezzlement as that term is defined in our statutes.

The judgment of the lower court is reversed, and the case remanded for a new trial.

CROW, C. J., MOUNT, GOSE, and PARKER, JJ., concur.

[No. 10293. Department One. January 25, 1913.]

C. M. WARD, *Appellant*, v. CHARLES F. MAGAHA, *as Executor etc., Respondent*.[1]

EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—PRESENTATION—SPECIAL ADMINISTRATORS—POWERS—"DEBTS." Under Rem. & Bal. Code, § 1420, authorizing the appointment of a special administrator under certain conditions "to collect and preserve the effects of the deceased," §§ 1421, 1422, requiring that he account for all goods, chattels, "debts" and effects and collect and preserve all goods, chattels, and "debts," § 1423, providing that his duties shall cease upon granting letters testamentary or of administration, and § 1424, providing that he shall not be liable to an action by any creditor of the deceased, the words "debts" includes only debts owing to the deceased; and the object being only to preserve the estate pending formal administration, and every provision of law relating to claims against the estate being elsewhere treated, a claim presented to and rejected by a special administrator is of no effect and insufficient to prevent the running of the statute of nonclaim, Id., § 1479, providing that no action shall be maintained on a claim against the estate unless it shall have been first presented to the executor or administrator, which is mandatory.

SAME—CLAIMS—FAILURE TO PRESENT—WAIVER—OBJECTION—HOW PASSED—PLEADING. The presentment of a claim against an estate under the statute of nonclaim is not entirely a matter of abatement, but a fact essential to a cause of action thereon, so that objection that no claim was filed may be first raised during the progress of the trial by the objection that the complaint does not state facts sufficient to constitute a cause of action.

SAME—PRESENTMENT—WAIVER. An executor or administrator has no power to waive the statute of nonclaim, Rem. & Bal. Code, § 1479, providing that no holder of a claim against an estate shall maintain an action thereon unless the claim shall have been first presented (Overruling *Neis v. Farquharson*, 9 Wash. 508).

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 13, 1912, dismissing an action to enforce a claim against the estate of a decedent, after a trial before the court. Affirmed.

Edgar J. Wright and *J. L. Corrigan*, for appellant.

J. H. Allen, for respondent.

[1]Reported in 129 Pac. 395.

CHADWICK, J.—This is an action brought to recover a debt against the estate of Robert J. English, deceased. English died testate on September 27, 1909, and on December 1, 1909, Robert Boyker was appointed special administrator of the estate, the executor at the time being a non-resident. In August following, defendant Charles F. Magaha, who was named as an executor of the will, qualified and has since administered the estate. After the appointment of Boyker, a claim in due form was presented by plaintiff. It was thereafter rejected, whereupon this suit was brought, pending which and after the answer had been filed, the attorneys for the respective parties stipulated that the present executor should be substituted as defendant, and that the case should proceed to trial upon the pleadings as then made up. Upon the trial of the case, it appearing that the claim had never been presented to the executor, the court sustained a motion to dismiss the case, and from a judgment of dismissal, plaintiff has appealed. The concrete questions presented are: (1) Is the presentation of a claim to a special administrator a sufficient presentation under our statute of nonclaim? (2) If the presentation was not formal, was it waived by answering and going to trial on the merits?

It is clearly the policy of our law to keep the administration of estates within the hands of regularly appointed administrators, and to rely upon special administrators only in cases of emergency and for a limited time. Sections 1420-1425, Rem. & Bal. Code. Section 1420, Rem. & Bal. Code, enumerates the conditions under which a special administrator may be appointed, and defines his duties " . . . to collect and preserve the effects of the deceased . . ." Section 1421 provides for the giving of a bond with condition that he will return a true inventory of the "goods, chattels, rights, and credits," and will account for all "goods, chattels, *debts* and effects" of the deceased. Section 1422 provides that he shall collect all "goods, chattels, and *debts*," and preserve the same for the executor or administrator when

appointed. Section 1423 provides that his duties shall cease upon the granting of letters testamentary or of administration. Section 1424 provides that the special administrator "shall not be liable to an action by any creditor of the deceased."

In discussing sections 1421 and 1422, it is argued that, because the statute uses the words "rights and credits" and "debts," "debts" must mean debts owing by the deceased. Taking the whole statute, its words and purpose, we think it intends to cover only such debts and choses in action as may be assets of the estate. The only object in appointing a special administrator is to preserve the assets pending a formal administration, and nowhere is the matter of debts owing by the deceased mentioned, except the provision that the limitation for all suits shall begin to run from the time of granting letters, and that the "special administrator shall not be liable to any action by any creditor." Every provision of the law going to the matter of claims is elsewhere covered, and we will not presume that the legislature intended to leave the right to present a claim to a special administrator concealed in words of doubtful meaning. Counsel says, however, that although the law may be that a special administrator shall not be liable to suit, it nowhere says that a creditor cannot serve his claim on the special administrator; that it is the duty of the special administrator to keep such claims and turn them over to his successor for approval or rejection.

There is much of equity in the argument advanced by counsel, but all claims against estates are collectible under the statute, and not otherwise; and while the statute does not say in terms that a claim cannot be presented to the special administrator, it does say, inferentially at least, that a special administrator shall have nothing to do with claims. His duties as defined omit all reference thereto. This seems certain when his duties are compared with the duties of an executor or administrator, it being there provided that they

shall give notice to creditors and make provision for the payment of claims. The statute does say that "no holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator." Rem. & Bal. Code, § 1479. This section has been held mandatory by this court. *McFarland v. Fairlamb*, 18 Wash. 601, 52 Pac. 239; *Strong v. Eldridge*, 8 Wash. 595, 36 Pac. 696; *Foley v. McDonnell*, 48 Wash. 272, 93 Pac. 321.

The powers of a special administrator are purely statutory, and are limited to the collection and preservation of the personal estate and to caring for the real property for the general administrator when appointed. He has no power to exercise the powers and duties conferred upon a regular administrator, "such as the allowance of claims." 18 Cyc. 1326. *State ex rel. Bartlett v. Second Judicial District*, 18 Mont. 481, 46 Pac. 259; *In re Ford's Estate*, 29 Mont. 283, 74 Pac. 735; *Estate of Sackett*, 78 Cal. 300, 20 Pac. 863; *In re Wincox's Estate*, 186 Ill. 445, 57 N. E. 1073; *Succession of Supple*, 23 La. Ann. 24; *In re Parish Estate*, 29 Barb. 627.

In the first case cited, it was held that, the power of a special administrator being statutory, he could neither allow nor reject a claim, and that an order of the district court directing the payment of an indebtedness was void. In *In re Ford's Estate*, the special administrator was denied credit for expenses incurred in the appointment of appraisers and the expense of publishing notice to creditors, because he was without authority to incur either, it being held that to sanction his publication of notice to creditors would be to limit the time for the presentation of claims in plain contravention of the statute.

It being clear, upon principle and authority as well as the statute, that a special administrator has no power to pay claims against the estate, it follows that he has no authority to either allow or reject them. This being so, the ques-

tion for us to decide is whether a creditor of an estate who has never made legal presentation of his claim, and who has commenced an action against one who cannot be sued under the statute (Rem. & Bal. Code, § 1424), can recover upon the sole ground that the defendant executor has stipulated to adopt the pleadings filed by the special administrator, and did not raise the objection as to presentation until the trial was in progress. In other words, was the objection urged waived by the executor when he adopted an answer going to the merits and went to trial upon it? Respondent takes the position that the complaint does not state a cause of action, and that, under repeated rulings of this court, an objection as to the sufficiency of the complaint can be made at any time, even in this court. It is unnecessary to collect or review the decisions to sustain this proposition. On the other hand, appellant contends that the failure to present the claim in proper form is matter of abatement only, and unless pleaded, is waived. To sustain this position, he relies upon many cases, among them: *Clayton v. Dinwoodey*, 33 Utah 251, 93 Pac. 723; *Bemmerly v. Woodward*, 124 Cal. 568, 57 Pac. 561; *In re Morgan's Estate*, 46 Ore. 233, 77 Pac. 608, 78 Pac. 1029.

We cite these cases because the statutes of California, Oregon and Utah are substantially the same as our own. We may grant that these cases sustain appellant's contention, although this court has held contrary to the rule of the Utah case; but they will not be held to control this case, for the rule of practice in this state is that an objection to a complaint because it does not state a cause of action may be taken at any stage of the proceedings. In view of our special statute of nonclaim, we think the formality of presentment is not entirely a matter of abatement. It is true the debt may live, but the statute is designed for the protection of estates and to bar a recovery. The reasoning of the cases above noted is not entirely satisfactory, nor is the California case in entire accord with the reasoning of

other cases decided by the same court. The general rule is that an executor is a trustee for the heirs, and in no sense stands in the shoes of the deceased; that he is bound by the statute, and cannot waive, as against the heirs or devisees, any requirement of the statute. 18 Cyc. 500; 11 Am. & Eng. Ency. Law (2d ed.), p. 924; *Cochrell v. Seasongood* (Miss.), 33 South. 77; *Winchell v. Sanger*, 73 Conn. 399, 47 Atl. 706, 66 L. R. A. 935; *Fitzgerald's Estate v. First Nat. Bank*, 64 Neb. 260, 89 N. W. 813 (syllabus); *Farwell v. Richardson*, 10 N. D. 34, 84 N. W. 558; *Miller v. Ewing*, 68 Ohio St. 176, 67 N. E. 292; *Thompson v. Hoxsie*, 25 R. I. 377, 55 Atl. 930.

Our views are further sustained by the holding of almost all courts, that the plea of the statute of limitations cannot be waived or omitted by an administrator; if so, he cannot, by such omission, waive the bar of the statute of non-claim as against the estate. The cases of *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254; *Megrath v. Gilmore*, 15 Wash. 558, 46 Pac. 1032, and *Neis v. Farquharson*, 9 Wash. 508, 37 Pac. 697, are also relied on. The *Donnerberg* case did not decide "that presentation as required by Rem. & Bal. Code, § 1479, was not necessary before the commencement of the action." *McFarland v. Fairlamb*, *supra*. The action was pending at the time of the death of the defendant in the *Megrath* case. In *Neis v. Farquharson*, it is said:

"In the second place, the appellants are not in a position to urge the objection in this court that there was no presentation of plaintiffs' claim or demand to the administrator. The record does not show that the objection was made in the court below and it cannot be taken for the first time in the appellate court."

This would seem to sustain the theory that the presentation of a claim could be waived, but the expression is inconsistent with the later ruling of the court as declared in the

McFarland and other cases. Since those decisions the statute must be taken as it reads, and the presentation is a fact essential to the cause of action as much so as the instrument sued on. Our conclusion is, therefore, that that part of the decision in the case of *Neis v. Farquharson*, hereinafter quoted, is not the law and should be overruled with the rest of the opinion. See *Barto v. Stewart*, 21 Wash. 605, 59 Pac. 480. The *McFarland* and succeeding cases seem to be sustained by the better reason, considering, as we should, that the rule of the common law which passed the legal title to the administrator without restriction is greatly modified, if not entirely overcome, by the laws of this state; for, although retaining in a sense the theory that the title is in the administrator, it is more as a fiction than a reality. The administrator does not personate the deceased as he did at common law. Therefore he is bound to act as he would for a principal, moving in the same way, asserting the same rights, and pleading the same defenses. If he had the personal interest and title of a common-law administrator, he might waive a right or a defense, and the remedy of the heir would be against the administrator as for a *devastavit;* but under modern conditions, he cannot waive that which a statute says shall be done, for the statute measures as well the limit of his power as the extent of the creditors' or strangers' right.

In writing this we have in mind the case of *Denney v. Parker*, 10 Wash. 218, 38 Pac. 1018, where the compromise of a claim by an administrator pending a lawsuit was affirmed. The case is not made to rest upon authority, unless it be the case of *Parker v. Providence & S. Steamboat Co.*, 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. 869, 14 L. R. A. 414, and reference to that case will show that it was really bottomed upon a statute declaratory of the common law, giving an administrator power to arbitrate or compromise all doubtful claims independent of the order or direction of the court.

In the *Parker* case, it is said:

"Executors and administrators may submit to arbitration, or may adjust by compromise, any claims in favor of or against the estates by them represented, in the same manner and with the same effect as the testator or intestate might have done."

In some of the states the common law powers of an administrator are recognized by the courts notwithstanding the statutes. They seem to have been unwilling to break away from the common law; whereas it seems to us that the purpose of the statutes making an administrator amenable to the orders of the court was intended to avoid the uncertainty and confusion of the resultant rule as announced in most all of the older cases. We quote it from the Rhode Island case:

"If, in the exercise of this power, the executor or administrator, by reason of negligence, or any serious error in judgment, obtains a less sum than he would clearly be entitled to recover at law, he may be held to be guilty of a *devastavit*, and be required to make up the loss out of his own estate; but still the compromise, if made in good faith, would be binding upon the parties thereto. In *Rogers v. Hand*, 39 N. J. Eq. 270, 275, which was a case in which the executors compromised and settled a claim against the estate, without suit, the court says: 'When they act in good faith, those who would impeach their conduct must show fraud or mistake, or that they have acted without authority or contrary to law.' "

There is now no reason for ignoring our statutes and allowing an administrator to waive a right, or admit, by his action or inaction, a claim against an estate. The reasons stated in the *Denney* case are unsound. The case seems to have proceeded upon the theory that the probate court was something "over the hills and far away," whereas it was the same court in which the action was pending, and with full power in the same judge to discontinue the action at law until the probate record could be made up. *Sloan v. West*, 63 Wash. 623, 116 Pac. 272. The reasoning of the late

Chief Justice Dunbar, in his dissenting opinion to the decision under discussion, seems to us to be unanswerable.

Appellant further contends, and sought to put this contention into legal form by the proffer of an amended complaint alleging that, inasmuch as the special administrator did for eight or nine months administer the estate by acknowledging and paying claims, the executor should now be estopped to question his authority; especially so after stipulating to accept his answer as his own. It will be seen, by reference to the authorities cited, that the conduct of the special administrator in excess of his duties as defined by statute, nor the act of the administrator, can operate to deprive the estate of the benefit of the statutes of nonclaim. If we were to so hold, the estate would be put in a worse position by the appointment of an executor than it was before, for no action could have been maintained against the special administrator (§ 1424). Yet we are called upon to hold that an executor can ratify something that the statute expressly forbids. Appellant's remedy as a creditor was to ask for the appointment of some suitable person as administrator, so that he might present his claim in a formal way.

Affirmed.

CROW, C. J., GOSE, MOUNT, and PARKER, JJ., concur.

[No. 10690. Department Two. January 25, 1913.]

EDWARD O'BRIEN, *Appellant*, v. WASHINGTON WATER POWER COMPANY, *Respondent*.[1]

STREET RAILROADS—INJURY TO PERSONS ON TRACK—NEGLIGENCE—EXCESSIVE SPEED—QUESTION FOR JURY. In an action by the driver of a team, struck by a street car, the negligence of the defendant is a question for the jury, where there was evidence that the car was exceeding the speed limit when the motorman first discovered the team on the track 300 feet away, and that the speed was not reduced until within two car lengths of the wagon; exceeding the lawful speed limit being negligence *per se*.

SAME—CONTRIBUTORY NEGLIGENCE—ORDINANCES—LAW OF ROAD. An ordinance requiring all vehicles to keep as near to the right-hand curb as possible was not intended to prohibit the driver of a wagon from driving upon a street car track in the center of the street, and it is not contributory negligence *per se* to do so.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Where plaintiff testified that he was unable to drive off a street car track in time to avoid a collision, owing to a passing automobile and the skidding of his wheels on the rails, and there was evidence that he was intoxicated and inattentive, his contributory negligence was a question for the jury.

SAME—PROXIMATE CAUSE—QUESTION FOR JURY. Whether the negligence of the defendant or the contributory negligence of the plaintiff was the proximate cause of the accident, is a question for the jury, where a street car collided with a wagon, on the track, through the contributory negligence of the driver in failing to see the approaching car in time to get off the track, and the motorman saw the plaintiff's wagon on the track 300 feet away, and slowed down and might have applied the emergency brake in time to have avoided the collision.

Appeal from a judgment of the superior court for Spokane county, Yakey, J., entered March 9, 1912, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for personal injuries sustained through the collision of a wagon and a street car. Reversed.

Morrill, Chester & Skuse, for appellant.

Post, Avery & Higgins, for respondent.

[1]Reported in 129 Pac. 391.

ELLIS, J.—This is an action to recover damages for personal injuries sustained by the plaintiff as the result of a collision of his wagon and one of the defendant's street cars on Sprague avenue, between Altamont and Cook streets, in the city of Spokane. The pleadings presented, and the evidence was directed to, the usual issues of negligence, contributory negligence, and proximate cause.

The evidence adduced was, in substance, as follows: The plaintiff resided about five miles southeast of Spokane. He was well acquainted with Sprague avenue, generally driving upon it in going to and from the city. At the place of the accident, a suburban portion of the city, the defendant had a single street car track along the avenue near the middle. The street from there east, and for several blocks to the west, was unpaved. There was a space of from twenty-two to twenty-seven feet between the south rail of this track and the south curb of the street. The track extended east of the place of the accident four or five blocks in a straight line. The accident occurred between seven and eight o'clock in the evening of September 30, 1911. The street was dark but for a light at the corner of Cook street and Sprague avenue. The car was lighted within and had an ordinary head light burning. The plaintiff had started for his home with a team pulling a heavy farm wagon, but without load. He had driven along the south side of the avenue to a point about midway between the intersection therewith of Altamont street on the west and Cook street on the east.

He testified, that he heard the horn of an automobile behind him and turned to his left to allow it to pass; that in so doing, the left-hand horse and the two left-hand wheels of the wagon passed upon the street car track; that while in this position, he looked down the track toward the east, and saw a street car about two blocks away coming rapidly in his direction; that he at once turned his horses to the right and tried to drive off the track, but that on account of the passing automobile and the skidding of the wheels upon the

rail of the track, which was three or four inches higher than the roadbed, he was unable to clear the track with the left hind wheel before the car struck it, threw him to the ground, and inflicted the injuries complained of. He estimated that he had driven upon the track for a distance of about fifty or sixty feet before the collision.

A witness who resided at the corner of Cook street and Sprague avenue testified, that he and another man were standing on the front porch of his house; that he first heard a signal from the car when it was about 150 feet east of Cook street and about 300 feet from the plaintiff; that he at once looked at the wagon and team, and watched it until the car struck the wagon; that as nearly as he could recollect, the horses' heads were pointed towards the southeast; that in his judgment the car was running at the rate of thirty miles an hour when he first saw it, and did not seem to slacken its speed until probably within two car lengths of the wagon, and was going between fifteen and twenty miles an hour when it hit the wagon. The other man who was on the porch did not see the collision, but stated that the car was going faster than cars ordinarily travel in that part of the city. An ordinance of the city in evidence limits the speed of street cars to ten miles an hour inside the fire limits and fifteen miles an hour in other parts of the city.

The motorman testified that he detected something on the track when he was one-third or one-half way in the block east of Cook street; that he first discovered that it was a wagon and team when about a car's length or fifty to fifty-five feet away; that when he first saw the object he had on full power, and threw off the power, put on the brakes, and blew the whistle; that at that time he was running twelve or fourteen miles an hour; that he had slowed down to a speed of about seven miles an hour when he discovered what it was upon the track, and that he then applied the emergency brake, and that the car went almost a car's length beyond the wagon before it stopped; that after the fender of the

car had hit the rear wheel of the wagon and shoved it from the track, he released the emergency brake to ease the stop and prevent injury to his passengers, which caused the car to run further than it otherwise would. Two witnesses, who were passengers on the car, testified that it was not running faster than the ordinary speed, and that just before the accident it came almost to a dead stop. A farmer, who at the time was driving along Sprague avenue in an easterly direction, between Altamont and Cook streets, testified that he heard several short blasts of a car whistle, indicating danger, and looking for the cause, saw the plaintiff in his wagon west of the witness, about 75 or 80 feet, going right up the track toward the car; that the car at the time was about half way in the block east of Cook street; that plaintiff was sitting with his head bent over on his breast, and made no effort to pull the horses from the track; that just an instant before the car struck the wagon, the horses swung off to the side of the track; and that when the car came to a standstill, its rear was beside the wagon. All of the witnesses who testified as to the accident, and others who were in the vicinity at the time, were questioned as to the presence of an automobile. None of them, save the plaintiff, saw any automobile in that vicinity.

Without specifying the several witnesses who testified upon the subject, it will suffice to say that there was ample evidence from which the jury might have found that the plaintiff was, at least to some extent, intoxicated at the time of the accident; one witness testifying that a short time before starting home the plaintiff was "pretty drunk." The plaintiff denied this and said that he had only had two glasses of beer.

The defendant introduced an ordinance of the city containing the following provisions:

"Section 1. In occupying or traveling upon the streets, avenues, highways and bridges of the city, all vehicles shall keep to the right as near the right hand curb as possible.

"Section 2. Vehicles meeting shall pass each other to the right.

"Section 3. Vehicles overtaking others shall in passing keep to the left.

"Section 18. Vehicles moving slowly shall keep as close as possible to the curb line on the right so as to allow faster moving vehicles free passage to the left."

An expert street car man testified in behalf of the defendant that a car of the kind here in question, by throwing off the power and applying the emergency brake, could be stopped, when running fifteen miles an hour, in seventy to eighty feet; when running fourteen miles an hour, in fifty to seventy feet; and when running seven miles an hour, in thirty-five feet. He further testified that, if the car was running only seven miles an hour when the motorman applied the emergency brake at a distance of fifty feet from the wagon, he would not have hit it at all.

At the close of the evidence, the defendant moved the court to instruct the jury to find a verdict for the defendant, upon the ground that the evidence conclusively established the contributory negligence of the plaintiff as the proximate cause of the accident. The motion was granted, and judgment entered accordingly. The plaintiff prosecutes this appeal.

In considering the respondent's motion for a directed verdict, we must accept as true all competent evidence adduced supporting the appellant's complaint. *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51. We must, therefore, proceed upon the assumption that the evidence was sufficient to show that the motorman was running the car at an excessive rate of speed when he first discovered something upon the track 300 feet ahead of him; that even then he did not reduce its speed till the car was within two car lengths of the wagon, and that the car was going at the rate of fifteen or twenty miles an hour when it struck the wagon. The question of the respondent's negligence was clearly one for

the jury. From the evidence, the jury might have found that the car was exceeding the lawful speed limit, which would be negligence *per se*. *Engelker v. Seattle Elec. Co.*, 50 Wash. 196, 96 Pac. 1039; *Wilson v. Puget Sound Elec. R.*, 52 Wash. 522, 101 Pac. 50, 132 Am. St. 1044.

The respondent contended, and the court held, that the appellant was guilty of contributory negligence, as a matter of law, upon the same principle; namely, that he was violating the city ordinance in that he was not keeping to the right, near the right hand curb, to allow "faster moving vehicles," such as automobiles, "free passage to the left." The appellant rejoined by a citation of the state law (Rem. & Bal. Code, § 5569), which provides that automobiles shall "turn to the right in passing vehicles, teams and persons moving or headed in the same direction," as justifying his turning to the left. We find it unnecessary to decide whether the statute would supersede the provisions of the ordinance so far as in conflict therewith, since we think that neither the statute nor that part of the ordinance relied upon by the respondent has any relation to the use of the street as between street cars and other vehicles. Whatever may be said of either statute or ordinance as determining negligence as between the driver of an automobile and the driver of a wagon, carriage, or dray, or of another automobile, the provisions cited were never intended to prohibit a vehicle from being driven upon a street car track. It was not negligence *per se* to drive upon the track. *Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659, 29 Pac. 346; *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284; *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214; *Baldie v. Tacoma R. & Power Co.*, 52 Wash. 75, 100 Pac. 162; *Keefe v. Seattle Elec. Co.*, 55 Wash. 448, 104 Pac. 774; *Pantages v. Seattle Elec. Co.*, 55 Wash. 453, 104 Pac. 629. As said in the *Keefe* case, "The facts declare the law in such cases." The question was for the jury upon the facts.

Whether the appellant was prevented from getting off the

track after seeing the car, because of a passing automobile and because of the skidding of the wheels of his wagon upon the elevated rail, or whether the failure was due to his own intoxication, were also questions for the jury. We will say in passing, however, that the fact that the appellant was intoxicated, if it be a fact, was no legal excuse for his failure to clear the track. *Conrad v. Graham & Co.*, 54 Wash. 641, 103 Pac. 1122, 132 Am. St. 1137; *Vizacchero v. Rhode Island Co.*, 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188.

But even assuming that the appellant was guilty of negligence, as a matter of law, there still remains the question as to whether his negligence or that of the respondent was the proximate or efficient cause of the accident. The motorman himself testified that, when about 300 feet distant, he discerned some object upon the track, which he discovered to be a wagon and team when about fifty feet away, when he applied the emergency brake, but too late to avoid the collision. When he first saw the object, he recognized it as a possible danger, since he claims that he then threw off the power, blew the whistle, and slowed down to seven miles an hour. The respondent's evidence shows that a car, such as the one in question, could be stopped by applying the emergency brake in a distance of thirty-five feet, and that if, as the motorman claims, the car was going at the rate of seven miles an hour when he applied the emergency brake, it would never have hit the wagon. It is hardly a sufficient excuse to say that he had the right to assume that the wagon would leave the track, since he testified that he did not know the object was a wagon till within fifty feet of it. If he did not know it was a wagon, he could hardly assume that it would leave the track. The danger, when he had approached to within fifty feet, was imminent, and it was for the jury to say whether, under the evidence, he should not have then had his car under such control as to be able to stop it before hitting the wagon. Whether, but for an excessive rate of speed, the motorman saw the appellant's danger in time to avoid

the collision, was a question of fact. If he did, it was his duty to stop, regardless of any negligence of the appellant; and his failure to do so, if because of excessive speed, was the proximate and efficient cause of the injury. These were questions for the jury. *Morris v. Seattle, Renton & Southern R. Co.*, 66 Wash. 691, 120 Pac. 534; *Nicol v. Oregon-Washington R. & Nav. Co.*, *ante* p. 409, 128 Pac. 628.

The decisions cited by the respondent are clearly distinguishable from this case upon the facts. In *Pantages v. Seattle Elec. Co.*, *supra*, it was merely held that the jury should have been instructed that the motorman had the right to assume, until the danger became imminent, that the automobile would leave the track in time to avoid a collision. As we have seen, there was no ground for this assumption under the motorman's evidence here. In *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525, the evidence showed that the motorman did not see the plaintiff until he came upon the track thirty or forty feet ahead of the car. The danger when first discovered was imminent, and the motorman had no chance to avoid it. Here the motorman saw the object on the track when 300 feet distant. In *Fluhart v. Seattle Elec. Co.*, *supra*, the plaintiff, a pedestrian unimpeded in any manner, was apparently never on the track, but carelessly walked so close to it as to be struck by the car.

Under the evidence before us, the case should have been submitted to the jury upon the questions of the respondent's negligence, the appellant's negligence, and proximate cause.

The judgment is reversed, and the cause is remanded for a new trial.

MOUNT, MORRIS, FULLERTON, and MAIN, JJ., concur.

[No. 9694. Department One. November 14, 1912.]

JOHN KANTON *et al.*, *Appellants*, v. ALBERT KELLY, *Respondent*.[1]

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 28, 1911, upon granting a nonsuit, after a trial before the court and a jury, in an action for wrongful death. Affirmed.

John E. Humphries and *Geo. B. Cole*, for appellants.

Farrell, Kane & Stratton, for respondent.

ON PETITION FOR REHEARING.

PER CURIAM.—We are requested by counsel for appellant to modify the language of our opinion upon rehearing filed in this case, found in 65 Wash. 622, 121 Pac. 833, which seems to criticise counsel for language used in their petition for rehearing. It is but fair to counsel for appellant to state that the language of the court complained of was used in disposing of a petition for rehearing which has been prepared but never filed or become a part of the record in this case. Copies of this petition had been sent by mail to the several judges, as is often done by counsel at the time of filing the original in the case. Thereafter another petition was filed, which became the formal petition for rehearing. This petition contained no language in the least discourteous to the court, and was evidently filed to avoid any seeming discourtesy which may have been contained in the former petition. In disposing of the questions presented upon rehearing, the court assumed that the first petition, which was in the hand of each judge, had been filed by counsel, as the practice of sending copies of such petitions to the several judges is quite uniform. We are satisfied that counsel had no intention of committing any act of discourtesy, and deem it but just to them that we now so state, in view of the fact that our language, seeming to so indicate, appears in the published report of the case.

A reexamination of the questions presented induces us to adhere to our former opinion upon the merits of the case. The petition for rehearing is therefore denied.

[1]Reported in 127 Pac. 568.

[No. 10554. Department One. November 20, 1912.]

CURTIS ANDERSON, *Respondent*, v. ADNA MILL COMPANY, *Appellant*.[1]

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 22, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a logging camp. Affirmed.

Reeves Aylmore, Jr., and *A. A. Hull*, for appellant.

Forney & Ponder, for respondent.

PER CURIAM.—Action by Curtis Anderson against Adna Mill Company, a corporation, to recover damages for personal injuries. From a judgment in plaintiff's favor, the defendant has appealed.

The respondent was injured at the same time, and in the same accident involved in the case of *Cunningham v. Adna Mill Co.*, *ante* p. 111, 127 Pac. 850. The only issues presented are issues of fact, which the jury upon sufficient evidence resolved in respondent's favor.

The judgment is affirmed.

[No. 10594. Department One. November 22, 1912.]

E. C. BOOTH *et al.*, *Respondents*, v. GRAYS HARBOR & PUGET SOUND RAILWAY COMPANY *et al.*, *Appellants*.[2]

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 11, 1912, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages to real property. Affirmed.

Bridges & Bruener (*Bogle, Graves, Merritt & Bogle*, of counsel), for appellants.

O. M. Nelson, for respondents.

PER CURIAM.—This case depends upon about the same state of facts and is governed by the same rule of law as the case of *Keil v. Grays Harbor & Puget Sound R. Co.*, *ante* p. 163, 127 Pac. 1113.

Judgment affirmed.

[1]Reported in 127 Pac. 851.

[2]Reported in 127 Pac. 1115.

[No. 10654. Department One. December 12, 1912.]

GEORGE F. FRYE *et al.*, *Appellants*, v. HIRAM C. GILL *et al.*, *Respondents*.[1]

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 31, 1912, upon the verdict of a jury rendered in favor of the defendants, in an action on contract. Affirmed.

G. F. Bogue, for appellants.

John W. Roberts, for respondents.

PER CURIAM.—This is an action to recover damages for an alleged breach of a lease contract, entered into by the plaintiffs as lessors with the defendant Gill as lessee, and upon a bond given by the defendant National Surety Company, to secure performance of the terms of the contract on the part of Gill. A trial before the court and a jury resulted in a verdict and judgment in favor of the defendants. The plaintiffs have appealed. Counsel for appellants has made a number of assignments of error which are rendered immaterial to the question of the correctness of the final judgment by the findings of the jury in the verdict and answers to special interrogatories. The controlling questions here presented are almost wholly questions of fact. We deem it sufficient to say that an examination of those portions of the record to which our attention has been called by counsel for the respective parties convinces us that the verdict and answers of the jury to the special interrogatories are fully sustained by the evidence. Other contentions we think are wholly without merit, and are not such as call for our discussion.

The judgment is affirmed.

[No. 10514. Department One. December 30, 1912.]

D. C. LEE *et al.*, *Respondents*, v. V. N. BOGUE, *Appellant*.[2]

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 24, 1912, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

G. F. Bogue, for appellant.

C. N. Young (*Chas. Arnold*, of counsel), for respondents.

[1]Reported in 128 Pac. 1135.

[2]Reported in 128 Pac. 1135.

PER CURIAM.—Among appellant's several assignments of error in this case, we regard none worthy of our serious consideration, save the question of the sufficiency of the evidence to sustain the verdict. We have carefully read the entire evidence, and are convinced therefrom that it fully sustains the finding of the jury. No useful purpose would be served by our discussion of the evidence here. It is doubtful whether this case is before us in such form as to call for our discussion of any of appellant's assignments of error; but since a reading of the very short statement of facts renders it plain that the case must in any event be affirmed upon the merits, we conclude to dispose of it in this manner.

The judgment is affirmed.

[No. 10947. *En Banc.* January 3, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Hans Bugge, Plaintiff,* v. M. E. HAY, *as Governor etc., Respondent.*[1]

Application filed in the supreme court December 20, 1912, for a writ of mandate to secure a certificate of election. Denied.

J. A. Sorley, for relator.

The Attorney General and *J. T. S. Lyle, Assistant*, for respondent.

PER CURIAM.—For the reasons stated in *State ex rel. Sampson v. Superior Court, ante* p. 484, 128 Pac. 1054, the application for a writ of mandate is denied in this case.

ELLIS and MAIN, JJ., took no part.

[No. 10948. *En Banc.* January 3, 1913.]

THE STATE OF WASHINGTON, *on the Relation of W. P. Brown, Plaintiff,* v. M. E. HAY, *as Governor etc., Respondent.*[2]

Application filed in the supreme court December 20, 1912, for a writ of mandate to secure a certificate of election. Denied.

J. A. Sorley, for relator.

The Attorney General and *J. T. S. Lyle, Assistant*, for respondent.

PER CURIAM—For the reasons stated in *State ex rel. Sampson v. Superior Court, ante* p. 484, 128 Pac. 1054, the application for a writ of mandate is denied in this case.

ELLIS and MAIN, JJ., took no part.

[1]Reported in 128 Pac. 1058.

[2]Reported in 128 Pac. 1058.

[No. 10337. Department One. January 24, 1913.]

JOHN W. MILLER *et al.*, *Appellants*, v. JOHN GIPSON *et al.*, *Respondents*.[1]

Appeal from a judgment of the superior court for Franklin county, Holcomb, J., entered January 17, 1912, upon findings of the court and a jury in favor of the defendants, in an action for equitable relief. Affirmed.

Charles W. Johnson, for appellants.

Lovell & Davis, for respondents.

PER CURIAM.—This case was commenced and prosecuted by the plaintiffs, by a guardian *ad litem*, to cancel a deed executed by them in favor of one of the defendants, which they allege was procured from them by, and in pursuance of, a conspiracy entered into between the defendants, and by means of persuasion, wrongful advice, coercion, and wrongful suggestion, plaintiffs at the time being mentally incompetent to transact business or to execute such deed. From a judgment in favor of the defendants denying the relief prayed for, the plaintiffs have appealed.

While the relief prayed for was purely equitable, the cause was submitted to a jury by the court, for advisory findings in the form of answers to special interrogatories upon, (1) the question of appellants being mentally competent to transact business and execute the deed involved; (2) the question of conspiracy on the part of the defendants, and their wrongful advice, coercion, and influence exercised over appellants, resulting in the execution of the deed; and (3) the question of the consideration passing to appellants for the deed. These questions were all determined by the jury in favor of respondents. Thereafter the court made findings in keeping therewith in favor of respondents.

We find nothing in the contentions of counsel for appellants here presented worthy of serious consideration, except the questions of fact, which were determined against them by both the jury and the trial judge. A careful reading of the entire evidence convinces us that the findings of both the jury and the trial judge are well supported by the evidence. We would be inclined to take this view even were the burden of proof upon the respondents.

A review of the evidence in detail here would be of no value to the profession or the parties to this case. We conclude that the judgment must be affirmed. It is so ordered.

[1]Reported in 128 Pac. 913.

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4. APPEAL—DECISIONS REVIEWABLE—FINALITY — STRIKING DEFENSE. An order striking parts of an affirmative defense but leaving an issue to be tried, is not appealable, since the order did not determine the action or prevent a final judgment, within the meaning of Rem. & Bal. Code, § 1716 authorizing appeals. *Methow Canal Co. v. Barton* 401

IV. RIGHT TO APPEAL.

5. APPEAL—REVIEW—CESSATION OF CONTROVERSY. Objection to the jurisdiction of a state court to appoint a receiver for an insolvent railroad company, on the ground that the Federal court has appointed receivers for it, will not be considered on appeal, where pending the appeal, the Federal court recognized the prior assumption of jurisdiction by the state court, and for that reason alone had discharged its receivers and dismissed the bill. *Crawford v. Seattle, Renton & Southern R. Co.*..... 77

6. APPEAL—ORDERS REVIEWABLE—CESSATION OF CONTROVERSY. An appeal from an order imprisoning a party for contempt of court will be dismissed, where it appears on the hearing that he has been discharged and has complied with the order adjudging the contempt. *Gust v. Gust*..... 189

V. PRESERVATION AND RESERVATION IN LOWER COURT.

7. APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS TO PLEADINGS AND EVIDENCE. The relevancy of evidence of a waiver of proofs of loss after the expiration of the time fixed in the policy, under pleadings raising an issue as to waiver before the expiration, not having been raised at the trial, except by objection that it was "immaterial," cannot be first made on appeal, counsel not having suggested surprise on account of the admission of the testimony. *Hatcher v. Sovereign Fire Assurance Co.*..... 79

APPEAL AND ERROR—CONTINUED.

8. APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS—EXCEPTIONS. Error cannot be predicated on improper testimony, admitted without objection or exceptions to instructions given or refused. *Keil v. Grays Harbor & Puget Sound R. Co.* 163

9. APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS TO EVIDENCE—REVIEW. Error cannot be predicated upon misconduct of the party and counsel, in a personal injury case, in exciting the sympathy of the jury by showing that the plaintiff was a widow with children, where the evidence was admitted without objection of any kind until after verdict. *Keough v. Seattle Elec. Co.* 466

10. APPEAL—OBJECTIONS TO MISCONDUCT OF COUNSEL. Misconduct of counsel in asking improper questions cannot be urged as error where no timely objection was made below. *Keough v. Seattle Elec. Co.* 466

11. APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS. After a trial on the merits without objection, it cannot be urged on appeal that the action should have been tried at law as one for damages and not as one for equitable relief. *Payne v. Lindsey Co.* 293

12. APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS—DISMISSAL. In an action to foreclose a mortgage, dismissed without prejudice, the defendant cannot object, for the first time on appeal, that the court should have retained jurisdiction to reform the mortgage to correct a technical error. *Van Alstine v. Gray* 607

13. APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS TO INSTRUCTIONS—MANNER AND TIME OF TAKING. Exceptions to instructions and to the refusal to give instructions may not be merely filed but must be called to the attention of the judge and noted in the minutes as required by Rem. & Bal. Code, § 384, although they may be taken at any time before the hearing of a motion for a new trial. *State v. Peeples* 451

VIII. EFFECT OF TRANSFER OF CAUSE.

14. APPEAL—EFFECT OF TRANSFER—PROCEEDINGS IN LOWER COURT—JURISDICTION—MODIFICATION OF DIVORCE. Under Rem. & Bal. Code, § 1731, which provides that, on appeal, the whole cause shall be brought to the supreme court and that the superior court shall have jurisdiction only to perfect the appeal, the trial court has no jurisdiction to modify a decree of divorce after appeal taken. *Gust v. Gust* 75

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

15. APPEAL—SUPERSEDEAS—INJUNCTION. Rem. & Bal. Code, § 1723, providing for a supersedeas on appeal from a final judgment in a cause wherein a "temporary injunction has been granted," does not authorize a supersedeas, where a temporary restraining order was is-

APPEAL AND ERROR—CONTINUED.

sued without notice until a hearing could be had, and upon an order to show cause why a temporary injunction should not issue, the parties appeared and agreed to an early trial on the merits, and a continuance was had upon the application for the injunction *pendente lite*, leaving the restraining order in *statu quo*, and after trial, final judgment was entered dismissing the case, and no injunction was issued and no agreement made that the restraining order should stand as a temporary injunction. *State ex rel. Ferguson v. Grady*..... 1

16. APPEAL—BONDS—SUPERSEDEAS—IN AID OF EXECUTION—AMOUNT—CONTEMPT. Under statutes giving ample power to the court to enforce its judgments by execution against the person and to order commitment until full performance of the judgment, a court having directed the deposit in court of a stock certificate valued at $70,000, and upon appeal from such order, having fixed the supersedeas bond in double the value of the property, may attach the person of the defendant for contempt upon failure to deposit the stock or give the bond; and upon appeal from an order of commitment for contempt, may fix the supersedeas bond in the sum of $70,000; since such bond is more than a mere supersedeas of punishment for contempt but is in aid of execution, and has the same effect as the first supersedeas. *State ex rel. Sargent v. Superior Court*..... 495

X. RECORD.

17. APPEAL—RECORD—AFFIDAVITS. Affidavits not made a part of the record cannot be considered on appeal. *Gantenbein v. Pasco*... 635

18. APPEAL—RECORD—STATEMENT OF FACTS. In the absence of a statement of facts to bring up the evidence on which a party was adjudged in contempt of court, it will be presumed that the evidence sustained the judgment and the order must be affirmed. *Gust v. Gust* 189

19. APPEAL—RECORD—STATEMENT OF FACTS—NECESSITY. In the absence of a statement of facts or bill of exceptions showing the evidence admitted at a trial on the merits, error cannot be predicated on refusing to require the complaint to be made definite and certain. *Ritchardson v. Ingalls*..... 291

20. APPEAL—RECORD—STATEMENT OF FACTS. In the absence of the evidence, brought up either by a bill of exceptions or statement of facts, it will be presumed that the verdict was properly returned. *Stedman v. Keener*..... 462

21. APPEAL—RECORD—EXCEPTIONS—SUFFICIENCY. Exceptions to findings of fact, filed within five days after recognition of the existence of the findings and decree, will be deemed to have been duly taken, in the absence of any objection thereto. *Schultz v. Schultz*..... 327

APPEAL AND ERROR—CONTINUED.

XVI. REVIEW.

22. APPEAL—REVIEW—WAIVER OF ERROR. Error in refusing a continuance is waived where the party thereupon took a voluntary dismissal. *Furman v. Bon Marche*..... 238

23. APPEAL—REVIEW—DISCRETION. Failure to order a sale of mortgaged property in parcels is not reversible error where abuse of discretion is not shown by the record. *Heal v. Evans Creek Coal & Coke Co*..... 225

24. APPEAL—REVIEW—DISCRETION—NEW TRIAL. The supreme court will not interfere with the discretion of the trial court in granting a new trial for insufficiency of conflicting testimony, except for clear abuse of discretion. *Bank of Commerce v. Newberry*..... 422

25. APPEAL—REVIEW—VERDICT. The question of agency is usually one of fact for the jury, whose verdict on conflicting evidence will not be disturbed. *Klodek v. May Creek Logging Co*..... 573

26. APPEAL—REVIEW—FINDINGS. Findings in favor of the plaintiff upon conflicting evidence will not be disturbed on appeal, when supported by evidence, and there was not such preponderance in defendant's favor as to entitle him to a dismissal. *Sherman v. Pittwood* 515

27. APPEAL—REVIEW—FINDINGS. Findings of the trial court will not be disturbed on appeal, where they are sustained by the fair preponderance of the evidence. *Brounty v. Majors*..... 571

28. APPEAL—REVIEW—HARMLESS ERROR—ELECTION. In an action tried to the court, it is not prejudicial error to refuse to compel the plaintiff to elect between a cause of action upon an implied contract for services rendered, and a second cause of action upon a promissory note alleged to have been given as collateral security for the account due for services, where judgment was asked only upon the first cause of action and the note was ignored at the trial and in the decision. *Blom v. Blom Codfish Co*..... 41

29. APPEAL—REVIEW—HARMLESS ERROR. Error in requiring an election is harmless, where from the record it is evident that the action was properly dismissed because the contract sued on had been mutually abandoned. *Lamar v. Anderson*..... 314

30. APPEAL—REVIEW—HARMLESS ERROR. In an action tried to the court, it is not material whether the court used the proper measure of damages, where there was ample evidence to warrant the court's finding of damages. *Guinn v. Roelofs*..... 342

31. APPEAL—REVIEW—HARMLESS ERROR. The admission of account books in evidence cannot be alleged as error, where the items considered in the account were credits favorable to appellant and reduced the claim. *Blom v. Blom Codfish Co*..... 41

APPEAL AND ERROR—CONTINUED.

32. APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated on the admission of improper evidence going to the question of damages, where it is not claimed that the verdict was excessive. *Keough v. Seattle Elec. Co.* 466

33. APPEAL—REVIEW—HARMLESS ERROR. Error in the exclusion of evidence is not prejudicial, where from the whole record it appears that the fact was established by other evidence. *Klodek v. May Creek Logging Co.* 573

34. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Prejudicial error may not be predicated on instructions that do not fit the facts of the particular case where other proper instructions were given so that the law of the case was before the jury. *Melius v. Chicago, Milwaukee & Puget Sound R. Co.* 64

35. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. A cause will not be reversed for the giving of instructions requested by both sides, hostile in theory and confusing, where the jury was not misled, although the court should have adopted a theory of its own, or given the instructions requested by one side only. *Melius v. Chicago, Milwaukee & Puget Sound R. Co.* 64

36. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It is not prejudicial error that instructions were given to the jury after the argument, in disregard of the statute. *Wheeler v. Hotel Stevens Co.* 142

37. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for malpractice, an instruction on the subject of the degree of care required, referring to it as such care and skill as the plaintiff "should expect," or as the public had a "right to expect" is not prejudicial error, where in the same instruction defendants' undertaking was specifically stated to be to use "reasonable care and skill," and also later instructions stated the rule in the language requested by the appellants. *Williams v. Wurdemann* 390

38. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for personal injuries, revived on behalf of heirs after the death of the plaintiff, error in an instruction that the heirs could recover such a sum as the plaintiff could have recovered if she were alive at present, is cured, when, upon objections made, it was explained to cover only such pain and suffering as the plaintiff suffered up to the time of her death. *Thompson v. Seattle, Renton & Southern R. Co.* 436

39. APPEAL—DECISION—LAW OF CASE. A decision upon a former appeal that an action was commenced within time limited by statute and was not barred by laches is conclusive on the second appeal. *Blinn v. Grindle* 120

APPEAL AND ERROR—CONTINUED.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

40. APPEAL—DECISION—REMAND. Upon reversing a case for error in admitting evidence which goes only to the amount of the verdict and not to the right of recovery, and the proper amount can be determined from the record, a new trial will not be awarded, but the judgment will be modified, with costs to appellant. *Anderson v. Seattle Lighting Co*..... 161

41. APPEAL—DECISION—REMAND. Where, in a divorce case, the record was unsatisfactory, and there was only a partial trial on *ex parte* affidavits and a failure to make complete findings, the cause will be remanded for a retrial rather than a trial *de novo* on appeal. *Schultz v. Schultz*..... 327

42. APPEAL—DECISION—REVERSAL AND REMAND—MANDAMUS TO LOWER COURT. Where, in condemnation proceedings, the judgment awarded to a defendant a sum deposited in court, and upon appeal by the other defendants the judgment was reversed and the cause remanded with directions to enter an order directing payment of the money to the other defendants, the same is a final determination of the merits, and the lower court cannot refuse to enter the order on the ground of want of jurisdiction, and because the money had been withdrawn by order of court prior to pendency of the appeal; and mandamus will issue to compel the lower court to enter the order as directed. *State ex rel. Smith v. Superior Court*..... 354

43. APPEAL—DECISION—REMAND—EFFECT—ISSUES ON SECOND TRIAL. In an action for rescission of a trade of land for a horse, on a second trial the issue is properly restricted to the single issue as to the value of the horse, where, on appeal, the supreme court remanded the case for determination of that question only; and evidence as to the value of the land is properly excluded. *Kleeb v. McInturff*..... 419

APPLIANCES:

Indemnity for damages paid through use of defective appliance, see INDEMNITY, 1, 5.

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 4, 7, 8, 12, 19, 25, 26.

APPLICATION:

For new trial, see NEW TRIAL, 1.

For change of venue, see VENUE.

APPOINTMENT:

Of receiver for insolvent corporation, see CORPORATIONS, 16.

Of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 1.

APPORTIONMENT:

Of costs, see COSTS, 1, 3.

APPROPRIATION:

Of capital stock, see CORPORATIONS, 2.
Of property for public use, see EMINENT DOMAIN.

ARBITRATION AND AWARD:

1. ARBITRATION AND AWARD — REVOCATION—SUBMISSION BY COURT. Since a submission to arbitration made a rule of court cannot be revoked by one of the parties without an order of court, one of the parties cannot revoke a submission in which the award was vacated because of irregularities and the matter resubmitted by order of court. *McCann v. Alaska Lumber Co*..... 331

2. SAME—VACATION—BIAS. Where no bias or prejudice is found, it is proper to refuse to vacate an award by arbitration. *McCann v. Alaska Lumber Co*..... 331

ARGUMENT OF COUNSEL:

In criminal prosecutions, see CRIMINAL LAW, 4.
In civil actions, see TRIAL, 3.

ASSAULT:

On passenger by employee of ship, see CARRIERS, 3, 4.

ASSESSMENT:

Of expenses of public improvements, see MUNICIPAL CORPORATIONS, 15.
Payment of as conferring rights in title to vacated street, see MUNICIPAL CORPORATIONS, 19.
Of tax, see TAXATION, 1, 2.

ASSIGNMENTS:

Joinder of assigned demands for fraud, see ACTION, 3.
Of account by corporation, see CORPORATIONS, 9, 11.
Leases, see LANDLORD AND TENANT, 1.
Minor's right of redemption from tax sale, see TAXATION, 7.
Liability of assignee of vendor under contract to convey by warranty, see VENDOR AND PURCHASER, 5.

1. ASSIGNMENTS—OPTION TO PURCHASE LAND. The rights of the vendor under an option contract for the purchase of land may be assigned, as the principle of personal confidence is not involved, where the vendee will receive a deed impressed with the agreed upon covenants of his vendor. *Big Bend Land Co. v. Hutchings*. 345

2. ASSIGNMENTS—CHOSE IN ACTION—ACTION FOR FRAUD. A cause of action for money procured by fraud and deceit in the sale of land, rescinded by the purchaser on discovery of the fraud, survives and is assignable. *Bell v. Jovita Heights Co*..... 7

ASSIGNMENTS—CONTINUED.

3. ASSIGNMENTS—ACTION BY ASSIGNEE—NECESSARY PARTIES. In an action upon assigned claims for money procured by fraud and deceit, the assignors are not necessary parties plaintiff, as the right of action may be enforced by the assignee. *Bell v. Jovita Heights Co.* 7

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 10, 11, 18, 19.
Of risk in using darkened stairway, see NEGLIGENCE, 1.

ASSURANCE:

Of master as to safety of appliance, see MASTER AND SERVANT, 19.

ATTACHMENT:

See EXECUTION.
Judgment *in rem* against property attached, see PROCESS.

1. ATTACHMENT — NATURE — PROCESS — PROCEEDING IN REM. An attachment is an ancillary proceeding only in cases where jurisdiction of the person is acquired in the main action; and in cases of service by publication the jurisdiction extends only to the property attached. *Clifford v. Pateros Transfer Co.* 665

ATTORNEY AND CLIENT:

Objections to conduct of, for purpose of review, see APPEAL AND ERROR, 9, 10.
Argument and conduct of counsel at trial in criminal prosecutions, see CRIMINAL LAW, 4.
Ratification of acts of attorney in instituting proceeding, see EMINENT DOMAIN, 13.
Attorney's fees in action on guaranty to pay note, see INDEMNITY, 3.
Argument and conduct of counsel at trial in civil actions, see TRIAL, 3.

1. ATTORNEY AND CLIENT—AUTHORITY — DISMISSAL OF ACTION. An attorney of record may enter a voluntary dismissal of the action, which is binding upon the client. *Furman v. Bon Marche* 238

ATTORNMENT:

See COVENANTS, 2.

AUTHORITY:

Of joint maker of note to procure discount by consent to material alteration, see ALTERATION OF INSTRUMENTS, 1.
Of attorney, see ATTORNEY AND CLIENT.
Of corporate officers or agents, see CORPORATIONS, 7.
Of executor to bring action for wrongful death, see DEATH, 5.

AUTHORITY—CONTINUED.

Institution of condemnation proceeding by attorney, see EMINENT DOMAIN, 13.

Of agents in cancellation of policies and return of premiums, see INSURANCE, 2.

To erect structures in navigable waters, see NAVIGABLE WATERS, 1.

Of cotenant, see TENANCY IN COMMON.

AUTOMOBILES:

Collision with pedestrian in city street, see MUNICIPAL CORPORATIONS, 20-22.

Damage to automobile stalled on railroad crossing, see RAILROADS.

AWARD:

See ARBITRATION AND AWARD.

BAILMENT:

1. BAILMENT—WAREHOUSEMEN—SPECIAL CONTRACT — BREACH — WAIVER—QUESTION FOR JURY. It is for the jury to determine whether a bailor's failure to remove goods amounted to a waiver of a special agreement whereby a warehouseman agreed to store goods on the fourth floor of a building, where the bailor, observing them on the first floor, told the manager that the goods were not stored according to agreement, and protested that the first floor was not a good place to store them. *Gafford v. Globe Transfer & Storage Co.*..... 204

BANKS AND BANKING:

Production of books used in conduct of business, see EVIDENCE, 1.

1. BANKS AND BANKING—CHECKS—DELIVERY TO AGENT—PAYMENT—FORGED INDORSEMENT. Where a check is drawn in favor of a principal and delivered to the payee's agent, the drawer does not vouch for the right of the agent or other person to indorse the name of the payee on the check; and in the absence of negligence or fault by the drawer, the bank must ascertain the identity of the payee before making payment, and is liable if it pays the check on a forged indorsement. *Goodfellow v. First National Bank*..... 554

2. SAME—DELIVERY OF CHECK TO AGENT—NEGLIGENCE OF DRAWER—EVIDENCE—SUFFICIENCY. Findings that the drawer of a check, which he delivered to one who claimed to be the agent of the payee, exercised due care and cannot be held for loss on a forgery of the payee's indorsement, are sustained by the evidence, where it appears that the supposed agent applied for a loan claiming to act as agent for the owners of the property, who had been known to the drawer ten years previously, that the drawer inquired for their address, and wrote them a letter making inquiry about the loan, but received no answer, and the agent delivered a forged note and mortgage purporting to be executed by the payee of the check. *Goodfellow v. First National Bank*..... 554

BAR:

Of action by former adjudication, see JUDGMENT, 4, 5.
Of action by limitation, see LIMITATION OF ACTIONS.

BEST AND SECONDARY EVIDENCE:

In civil actions, see EVIDENCE, 2.

BIAS:

Of judge, see VENUE.

BIDS:

Letting contract for public improvement, see MUNICIPAL CORPORATIONS, 3.

BILL OF EXCEPTIONS:

As part of record on appeal, see APPEAL AND ERROR, 19, 20.

BILLS AND NOTES:

Alteration of note, see ALTERATION OF INSTRUMENTS.
Enforcing contribution against part of makers of note, see CONTRIBUTION.
Parol evidence to vary writing, see EVIDENCE, 5.
Note of deceased, evidence of payment, see EXECUTORS AND ADMINISTRATORS, 6.
Forgery of note, see FORGERY.
Promise of accommodation indorser to pay note as within statute of frauds, see FRAUDS, STATUTE OF, 1.
Liability of accommodation indorser upon promise to pay note, see INDEMNITY, 2-4.

1. BILLS AND NOTES — EXECUTION—PRINCIPAL MAKERS—EVIDENCE—SUFFICIENCY. There is sufficient evidence that notes, signed by the defendants in the left hand corner, after they had been signed by others and indorsed for discount, were executed by defendants as principals and not as sureties, where a bank had refused to discount the notes, and only did so on the strength of the signatures of the defendants, who signed and put up collateral for the purpose of getting the notes discounted. *Handsaker v. Pedersen*..... 218

BONA FIDE PURCHASER:

Of lands, see VENDOR AND PURCHASER, 8.

BONDS:

Supersedeas on appeal, see APPEAL AND ERROR, 15, 16.
Guaranteeing performance of voidable lease, see GUARANTY.
Contractor's bonds, see MUNICIPAL CORPORATIONS, 6-9, 13.

BOOKS:

Production of books used in daily business by foreign bank, see EVIDENCE, 1.

BOOKS OF ACCOUNT:

Admissibility in evidence, see EVIDENCE, 3, 4.

BREACH:

Of contract to store goods, see BAILMENT.
Of contract, see CONTRACTS, 2, 5, 6.
Of covenant, see COVENANTS.
Damages for breach of contract, see DAMAGES, 1.
Of contract of sale, see SALES, 7, 8.

BRIDGES:

Across navigable waters, see NAVIGABLE WATERS.

BROKERS:

Agreement for commission on sale of personalty, see FRAUDS, STATUTE OF, 2.

1. BROKERS—CONTRACT FOR COMMISSIONS—PERFORMANCE AND OPERATION—FRAUDS, STATUTE OF. Under Rem. & Bal. Code, § 5289, requiring a contract employing a broker to sell real estate upon a commission to be in writing, a broker cannot recover for effecting an exchange of his principal's property, where the written contract employed him to make the exchange for certain specified property, which on inspection proved unsatisfactory and such trade was never consummated, although the broker was afterwards instrumental in effecting an exchange for other property not mentioned in the written contract of employment. *Reitz v. Bryant*..... 53

2. BROKERS — CONTRACT FOR COMMISSIONS — PERFORMANCE. Brokers who procured a purchaser to whom a sale was made through continuous negotiations covering 12 days, cannot be deprived of their commissions by an attempted discharge because of their inability to secure a loan by which the deal was to be consummated, where the owner himself procured the loan and consummated the deal, on terms somewhat different from those originally contemplated. *Merritt v. American Catering Co*..... 425

3. BROKERS—CONTRACT FOR COMMISSIONS—PERFORMANCE—VIOLATION OF INSTRUCTIONS. A broker authorized to purchase wheat at 75 cents per bushel net at warehouse, which gave the purchaser control of the shipping, did not perform his contract, where he purchased it at 78 cents, f. o. b., which gave the seller control of the shipping; especially where he reported the sales at "75 cents net to the farmer," when the warehouse charges were only 1½ cents; and where he purchased certain wheat on his own responsibility at a price three cents per bushel in excess of the authorized price. *Sheeran v. Ford Grain Co*..... 604

BROKERS—CONTINUED.

4. SAME—ACTIONS FOR COMMISSIONS—OFFSET OF DAMAGES BY VIOLATION OF INSTRUCTIONS. In such a case, where the broker was instructed to return and get the priced reduced according to instructions, which he was unable to do, whereupon the purchaser secured a cancellation of the contracts and accepted the wheat at 77 cents, f. o. b., the same was in the nature of a compromise, and in an action by the broker for commissions, the purchaser is entitled to offset its damages by reason of the excess price paid and its expenses. *Sheeran v. Ford Grain Co*..... 604

BULK STOCK LAWS:

Sale of stock in bulk, see FRAUDULENT CONVEYANCES.

BURDEN OF PROOF:

In action for contribution against part of makers of note, see CONTRIBUTION, 3.
To show compliance with sales in bulk law, see FRAUDULENT CONVEYANCES.
Upon application for writ of mandamus, see MANDAMUS, 2.
In civil action, see TRIAL, 1.

CANCELLATION OF INSTRUMENTS:

Cancellation of policies by agents, see INSURANCE, 2.
Rescission of contract, see SALES, 1-4; VENDOR AND PURCHASER, 3.
Setting aside tax deed, see TAXATION, 8.

CANDIDATES:

For office, see ELECTIONS.

CARRIERS:

1. CARRIERS — FARES — FRANCHISE — RATES FOR SCHOOL CHILDREN—CONSTRUCTION. A franchise requiring a street railway to carry "school children" at half fare applies only to those commonly referred to as school children, and not to students in universities or colleges or schools where a particular branch of learning is pursued; especially in view of our statutory distinctions between "school children" and "students" as found in Rem. & Bal. Code, §§ 4317, 4333, 4366, 4406, 4714. *State ex rel. Seattle v. Seattle Elec. Co*... 213

2. SAME—CONSTRUCTION BY PARTIES. A franchise ordinance requiring a street car company to carry school children at half fare having been construed by the street car company and the city to apply only to children attending public and private schools, the city cannot later contend that it should be construed to cover students at universities and colleges. *State ex rel. Seattle v. Seattle Elec. Co*..... 213

CARRIERS—CONTINUED.

3. CARRIERS—ASSAULT ON PASSENGER—LIABILITY FOR ACTS OF SERVANT—DEFENSES—ACTS OUTSIDE SCOPE OF EMPLOYMENT. A passenger on a ship is entitled to absolute protection from assaults by employees, and the carrier cannot plead that the servant acted outside the scope of his employment. *Marks v. Alaska Steamship Co.*..... 167

4. SAME—DEFENSES. Where an employee and a passenger on a ship engaged in a fight, and later the employee returned and renewed the assault after being ordered below, the carrier is liable for the injuries then inflicted, and cannot plead as a defense that plaintiff voluntarily engaged in the encounter. *Marks v. Alaska Steamship Co.* 167

5. CARRIERS — STREET CARS — NEGLIGENT OPERATION. The negligence of a motorman in attempting to pass an auto truck so dangerously near the track that a passenger in an open compartment was struck by the corner of the truck, is for the jury; especially in view of the degree of care owed to passengers. *Southard v. Seattle Elec. Co.* 434

6. CARRIERS—OF PASSENGERS—ELEVATORS—DEGREE OF CARE — NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. The question of the negligence of the defendant, in operating a passenger elevator in its store, is for the jury, where it appears that, after taking on plaintiff's companions, the elevator boy waited for the plaintiff at his post, with the elevator door open and the floor of the elevator four or five inches below the level of the floor, causing plaintiff to fall and break her knee on entering the elevator. *Perrault v. Emporium Department Store Co.*..... 523

7. SAME—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK BEFORE ENTERING ELEVATOR — EVIDENCE — QUESTION FOR JURY. Whether a customer in a store is guilty of contributory negligence in entering a waiting passenger elevator without looking and observing that the elevator was several inches below the level of the floor, is a question for the jury, where the elevator boy was at his post and the door was open. *Perrault v. Emporium Department Store Co.*... 523

8. CARRIERS—ELEVATORS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. It is contributory negligence, precluding any recovery for a fall down an elevator shaft, for the passenger to open the elevator door, which he found substantially closed, and step into the shaft for the purpose of taking the elevator without looking to see if it was there. *Wheeler v. Hotel Stevens Co.*..... 142

9. CARRIERS—TAKING ON PASSENGERS—SUDDEN JERKS—CONTRIBUTORY NEGLIGENCE—EVIDENCE — SUFFICIENCY. In an action for negligently starting a street car with a sudden jerk, alleged to have caused a miscarriage, it is error to instruct that there was no evidence of contributory negligence on the part of the plaintiff, where she testified that she lifted a child onto the car, and a physician testified that the miscarriage might have been caused by lifting the child. *Atwood v. Washington Water Power Co.*..... 518

CAVEAT EMPTOR:

Administrator's sales, see EXECUTORS AND ADMINISTRATORS, 5.

CERTAINTY:

Of statute in defining crime, see CRIMINAL LAW, 1.

CERTIFICATE:

Death certificate, see DEATH, 1.
Of engineer on performance of contract, see MUNICIPAL CORPORATIONS, 12.
Tax certificate, see TAXATION, 3.

CERTIORARI:

1. CERTIORARI—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL—ELECTION CONTEST. The delay incident to an appeal in an election contest does not authorize a review by certiorari, or render the remedy by appeal inadequate, by reason of the fact that the term of office begins, and the period of six months for preserving the ballots expires before the appeal can be heard; since the ballots can be preserved as other documentary evidence offered and rejected at the trial; and especially in view of the statute providing for appeals in election contests. *State ex rel. Quigley v. Superior Court*..... 503

CESSATION OF CONTROVERSY:

On appeal, see APPEAL AND ERROR, 5, 6.

CHANGE OF VENUE:

Mandamus to compel, see MANDAMUS, 1.
Of civil actions, see VENUE.

CHARGE:

To jury in criminal prosecutions, see CRIMINAL LAW, 6, 10, 12.
To jury in civil actions, see TRIAL, 4-10.

CHATTEL MORTGAGES:

Presumption as to defense in action to foreclose, in absence of election, see ELECTION.

1. CHATTEL MORTGAGES — VALIDITY — FAILURE TO RECORD — CREDITORS WITHOUT LIENS. The invalidity of a chattel mortgage by reason of failure to record it, valid as between the parties, cannot be asserted by creditors who had acquired only liens against the real property of the mortgagor. *Heal v. Evans Creek Coal & Coke Co*..... 225

CHECKS:

See BANKS AND BANKING.

CHILD:

Franchise ordinance fixing half rate fare for school children, see CARRIERS, 1, 2.

CHOSE IN ACTION:

Assignment, see ASSIGNMENTS, 2.

CITIES:

See MUNICIPAL CORPORATIONS.

CIVIL RIGHTS:

See CONSTITUTIONAL LAW.

CLAIMS:

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2-4.
Mining claims, see MINES AND MINERALS.
Against bond of contractor, see MUNICIPAL CORPORATIONS, 7-9.
For extras on performance of public work, see MUNICIPAL CORPORATIONS, 10, 11.
For labor and materials furnished on public work, see MUNICIPAL CORPORATIONS, 14.

CLOUD ON TITLE:

See QUIETING TITLE.

COLLATERAL ATTACK:

Appointment of executor, see EXECUTORS AND ADMINISTRATORS, 1.

COLLECTION:

Of estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2.

COLLISION:

Between automobile and pedestrian, see MUNICIPAL CORPORATIONS, 20-22.
Between street car and vehicle, or with person, see STREET RAILROADS.

COMMENCEMENT:

Of action, see ACTION, 5.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

COMMISSIONS:

Of broker, see BROKERS.

COMMON CARRIERS:

See CARRIERS.

COMPENSATION:

Of broker, see BROKERS.
Of corporate officers, see CORPORATIONS, 5, 6.
For property taken or damaged for public use, see EMINENT DOMAIN, 5-11.
Of attorney in action on guaranty to pay note, see INDEMNITY, 3.

COMPETENCY:

Of experts as witnesses, see EVIDENCE, 10.
Of physician attending injured workman, see MASTER AND SERVANT, 1.
Employing incompetent servant, see MASTER AND SERVANT, 16, 17.

COMPLAINT:

Filing of as commencement of action, see ACTION, 5.
In civil actions, see PLEADING, 1-3.

CONCLUSION:

Of witness, see EVIDENCE, 10.

CONCLUSIVENESS:

Of judgment, see JUDGMENT, 4, 5.
Of final certificate of engineer, see MUNICIPAL CORPORATIONS, 12.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONS:

Precedent to action, see ACTION, 1.
Precedent to action by corporation, see CORPORATIONS, 10. 11.
Precedent to adjudication of public use, see EMINENT DOMAIN, 12.
Precedent to prosecution for violation of pure milk law, see FOOD, 2.
Precedent to action on bond of contractor, see MUNICIPAL CORPORATIONS, 7-9.
Precedent to action to set aside tax deed, see TAXATION, 8.

CONDUCT:

Of counsel in argument to jury, see CRIMINAL LAW, 4.
Misconduct of juror, see CRIMINAL LAW, 7, 8.
Misconduct of counsel at trial of civil action, see TRIAL, 3.

CONSENT:

To alteration of note, see ALTERATION OF INSTRUMENTS.
Of beneficiary to action by executor for wrongful death, see DEATH, 5-8.

CONSIDERATION:

Of contract, see CONTRACTS, 3.
Of guaranty, see GUARANTY.

CONSOLIDATION:

Of actions, see ACTION, 3.
Of actions by heirs for wrongful death, see DEATH, 4.

CONSPIRACY:

Possession and intent to utter forged instrument, see FORGERY, 1.

CONSTITUTIONAL LAW:

Right to trial by impartial jury of county, see JURY.

1. CONSTITUTIONAL LAW—CIVIL RIGHTS—FREEDOM OF SPEECH AND OF THE PRESS. Rem. & Bal. Code, § 2564, prohibiting the editing of any printed matter tending to encourage disrespect for law, is not unconstitutional as abridging the right of free speech and of the press; since the legislature has power to punish abuse of the right. *State v. Fox* 185

CONSTRUCTION:

Of statute providing for survival of action for death, see ABATEMENT AND REVIVAL.
Of franchise fixing half rate fare for school children, see CARRIERS, 1, 2.
Of contract, see COVENANTS.
Of criminal statutes, see CRIMINAL LAW, 1, 2.
Of statute giving right of action for wrongful death, see DEATH, 4.
Of deed, see DEEDS.
Of pure milk law, see FOOD, 2.
Indemnity insurance policy, see INSURANCE, 1.
Of bridge across navigable waters, see NAVIGABLE WATERS.
Of agency agreement, see PRINCIPAL AND AGENT, 1.
Of warranty on sale of goods, see SALES, 5.
Of statute, see STATUTES, 2.

CONTEMPT:

Superseding order of commitment for, see APPEAL AND ERROR, 16.

CONTEST:

Review of election contest, see CERTIORARI.

CONTINUANCE:

1. CONTINUANCE—ABSENCE OF PARTY—DISCRETION. It is not an abuse of discretion to refuse a continuance, where two days' time was granted to take the deposition of the absent party. *Furman v. Bon Marche* 238

2. CONTINUANCE—ABSENCE OF WITNESSES—DISCRETION. It is not an abuse of discretion to deny a continuance on account of the absence of a witness, defendant's general manager, needed in the preparation of the defense, where it is admitted by the plaintiff that the witness if present would testify as it was claimed he would, and

CONTINUANCE—CONTINUED.

another witness testified in substance to the same effect, and was better able to give assistance in preparation than the manager. *Sorenson v. Danaher Lumber Co*..... 38

CONTRACTORS:

Liens for labor performed, see MECHANICS' LIENS, 1, 2.
On public works, see MUNICIPAL CORPORATIONS, 6-15.

CONTRACTS:

See BAILMENT; BILLS AND NOTES; COVENANTS; DEEDS; GUARANTY; INDEMNITY; INSURANCE; SALES.
Action in contract or tort, joinder of, see ACTION, 2.
Alteration, see ALTERATION OF INSTRUMENTS.
Assignment of action on, see ASSIGNMENTS, 1.
For broker's commissions, see BROKERS.
Franchise fixing rate for carriage of school children, see CARRIERS, 1, 2.
Implied contract of employment, see CORPORATIONS, 5.
Damages for breach, see DAMAGES, 1.
Parol evidence to vary written contract, see EVIDENCE, 5-7, 9.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Interest on balance due on contract, see INTEREST, 1.
Leases, see LANDLORD AND TENANT.
To provide medical attendance to injured workman, see MASTER AND SERVANT, 1-3.
Ground for mechanics' liens, see MECHANICS' LIENS, 1.
For public improvements, see MUNICIPAL CORPORATIONS, 1-5, 10-14.
Agency, see PRINCIPAL AND AGENT, 1.
Sales of realty, see VENDOR AND PURCHASER.

1. CONTRACTS — EVIDENCE — SUFFICIENCY. The evidence fails to establish a contract for slops for five months at ten dollars a month, where it appears that the defendant's foreman refused plaintiff a contract for longer than one month, directing him to the office of the company, where he paid $50 for five months on representing that the foreman had contracted with him therefor. *Kopczynski v. Bolcom-Vanderhoof Logging Co*..... 93

2. CONTRACTS—ESSENTIALS—MEETING OF MINDS — CONTRACT TO FORM CORPORATION—EVIDENCE—SUFFICIENCY. Recovery cannot be had for breach of a contract to form a corporation, where none of the vital essentials for the organization of the corporation, enumerated by statute, had been agreed upon by the parties, as there was no meeting of minds upon all the essentials of the contemplated contract; and especially where there was no evidence of breach of the contract other than the fact that they did not incorporate. *Watson v. Bayliss*..... 499

CONTRACTS—CONTINUED.

3. CONTRACTS—CONSIDERATION—PROMISE TO PAY DEBT OF ANOTHER. One purchasing property of a receiver under an agreement to pay all costs of the receivership, is liable for a feed bill incurred by the receiver, on the theory that, on a promise to pay to another the latter's debt to a third person, the third person may maintain an action thereon. *Reiley v. Spokane Sanitary Laundry Co*..... 516

4. CONTRACTS—WRITTEN CONTRACTS—ORAL RESCISSION. Parties to a written contract may abandon it by a mutual oral agreement. *Lamar v. Anderson*..... 314

5. CONTRACTS—BREACH—MEASURE OF DAMAGES. In an action for breach of contract to furnish slops for hog feed, the plaintiff cannot recover for expenses incurred before entering into the contract in reliance upon obtaining the contract; as they could not have been within the contemplation of the parties. *Kopczynski v. Bolcom-Vanderhoof Logging Co*..... 93

6. SAME—MEASURE OF DAMAGES—PROFITS—EVIDENCE. In such a case, loss of profits cannot be recovered on the mere statement of what the hogs cost, what they sold for, and what might have been obtained if the contract had not been breached, where it appears that the plaintiff could have obtained feed elsewhere the cost of which was not shown, and there was no showing of the cost or profit from feed obtained under the contract. *Kopczynski v. Bolcom-Vanderhoof Logging Co*..... 93

CONTRIBUTION:

Recovery over for damages paid employee through use of defective appliance, see INDEMNITY, 1, 5.

1. CONTRIBUTION — LIABILITY. Contribution against part of the makers of a note cannot be enforced unless the makers who paid the note were under legal obligation to pay it. *Peterson v. Nichols*.. 656

2. CONTRIBUTION — ACTIONS—EVIDENCE—ADMISSIBILITY. Upon a defense of breach of warranty and failure of consideration for a note, in an action for contribution by part of the makers who had paid the note to a bank as a holder in due course, it is error to exclude evidence that the bank had acted only as a collecting agent in prosecuting the suit on the note, as it tended to show that it was not a holder in due course, and that the defense of breach of warranty was available. *Peterson v. Nichols*..... 656

3. SAME—EVIDENCE — ADMISSIBILITY — BURDEN OF PROOF. In such case, the proof of the warranty and breach was admissible in defense, and would cast the burden on plaintiffs to show that the bank had been a holder in due course. *Peterson v. Nichols*..... 656

CONTRIBUTORY NEGLIGENCE:

See NEGLIGENCE.
Of passenger, see CARRIERS, 7-9.
Of servant, see MASTER AND SERVANT, 20-23.
Of person injured on street, see MUNICIPAL CORPORATIONS, 21, 22.
Of patient, see PHYSICIANS AND SURGEONS.
Of driver of automobile damaged at railroad crossing, see RAILROADS, 2, 3.
Of person injured by street railroad, see STREET RAILROADS, 2, 4-8.

CONVERSION:

By agent, see PRINCIPAL AND AGENT, 2.

CONVEYANCES:

See CHATTEL MORTGAGES; DEEDS; MORTGAGES.
Administrator's sales, see EXECUTORS AND ADMINISTRATORS, 5.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
Contracts to convey, see VENDOR AND PURCHASER.

COPIES:

Of lost papers as evidence, see EVIDENCE, 2.

CORPORATIONS:

See MUNICIPAL CORPORATIONS.
Fraud inducing sale of stock, see FRAUD.

1. CORPORATIONS—STOCK—SUBSCRIPTIONS—FULLY PAID STOCK. Where a corporation issued fully paid stock to stockholders in a corporation which it superseded, in consideration of the assets and good will of the first company, it cannot claim that the stock was not fully paid for because certain stock of the first company was not fully paid up; especially where it issued additional stock to equalize the prices paid for the stock of the first company. *Blom v. Blom Codfish Co.*... 41

2. CORPORATIONS—CAPITAL STOCK—TRUST FUND—APPROPRIATION. The assets of a corporation being a trust fund for creditors, its capital stock can be reduced only in the manner provided by statute; and persons appropriating the same are liable therefor. *Barnard Mfg. Co. v. Ralston Milling Co*..... 659

3. CORPORATIONS—FRAUDULENT SALE OF STOCK—LIABILITY OF AGENT—FRAUD. Where an agent, selling stock on a commission, induced plaintiff to purchase the stock by representations which he knew to be false respecting the personnel of the stockholders and the financial strength of the company, and which were relied on, he is liable to the purchaser in an action for damages for deceit. *Wentworth v. Moore*..... 396

4. CORPORATIONS—OFFICERS AND STOCKHOLDERS—LIABILITY. Stockholders who induced the extension of credit to an insolvent corporation by false representations as to the amount of stock subscribed are

CORPORATIONS—CONTINUED.

liable for the loss to the extent that the represented stock exceeds the amount actually subscribed. *Barnard Mfg. Co. v. Ralston Milling Co.* 659

5. CORPORATIONS — OFFICERS — EMPLOYMENT — IMPLIED CONTRACT. Where a president and trustee of a corporation rendered services as a general manager with the consent of the other officers, he can recover on an implied contract for services as general manager, without any express contract therefor. *Blom v. Blom Codfish Co.* 41

6. CORPORATIONS — OFFICERS — SERVICES — SALARY — FORFEITURE FOR FRAUD. Failure of a general manager working on a regular salary, to charge himself on the books with all the items properly chargeable to him, does not necessarily render him guilty of such fraud as to forfeit all his salary; especially where explanations are wanting through his decease, and all doubts were resolved against his estate. *Blom v. Blom Codfish Co.* 41

7. CORPORATIONS—REPRESENTATIONS—OFFICERS ADVERSELY INTERESTED —ULTRA VIRES ACTS—ESTOPPEL. A corporation is not estopped to question the legality of a transaction whereby one of its officers gave the note of the corporation in renewal of his personal note, as the transaction was presumptively *ultra vires*, and one dealing with such officer is presumed to know that he cannot bind the company in matters in which he is adversely interested; especially where the company derived no benefit from the transaction. *Mooney v. Mooney Co.* 258

8. SAME—ACTS OF OFFICERS—RATIFICATION—REQUISITES. In such case, there can be no ratification by the corporation through acts of the officer implicated, where a trustee whose authority was a necessary prerequisite had no notice of the acts. *Mooney v. Mooney Co.*.. 258

9. CORPORATIONS — REPRESENTATION — ASSIGNMENT BY OFFICER — EVIDENCE. An assignment of an account by a corporation executed by its assistant treasurer, is *prima facie* proof of the assignment *Pacific Drug Co. v. Hamilton* 469

10. CORPORATIONS—ACTIONS—CONDITIONS PRECEDENT—PROOF. The corporate existence and prepayment of license fee, as a prerequisite to suit by a corporation, may be established by oral evidence, notwithstanding Rem. & Bal. Code, §§ 3682 and 3715, providing for "*prima facie*" proof by the certificate of the secretary of state. *Pacific Drug Co. v. Hamilton* 469

11. CORPORATIONS — ACTION BY ASSIGNOR OF CORPORATION — ASSIGNED ACCOUNT. In an action upon an account assigned by a corporation, it is not a necessary prerequisite to prove the corporate existence and payment of the license fee of the assignor, which the statute makes a prerequisite to suit by the corporation, where there was *prima facie* proof of the assignment. *Pacific Drug Co. v. Hamilton* 469

CORPORATIONS—CONTINUED.

12. CORPORATIONS—INSOLVENCY—PRIMA FACIE PROOF. The insolvency of a corporation is *prima facie* shown, under Rem. & Bal. Code, § 3715, by failure to pay its annual license fee for one year after due date. *Barnard Mfg. Co. v. Ralston Milling Co*..... 659

13. SAME—NULLA BONA. The insolvency of a corporation is shown by judgment and return of *nulla bona* at the suit of a third party. *Barnard Mfg. Co. v. Ralston Milling Co*..... 659

14. CORPORATIONS—INSOLVENCY — LIABILITY OF STOCKHOLDERS. A judgment creditor of an insolvent corporation may maintain an action against stockholders, where there is a prayer for a receiver and general relief. *Barnard Mfg. Co. v. Ralston Milling Co*..... 659

15. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS — FRAUD. Rem. & Bal. Code, §§ 3677 and 3698, measuring and limiting the liability of stockholders in a corporation, do not protect a stockholder from the consequences of fraudulent representations inducing the extension of credit to the corporation when insolvent. *Barnard Mfg. Co. v. Ralston Milling Co*..... 659

16. CORPORATIONS — INSOLVENCY — RECEIVERS — GROUNDS FOR APPOINTMENT — MISREPRESENTATION BY STOCKHOLDER — COMPLAINT — SUFFICIENCY. A complaint states a cause of action for the appointment of a receiver of an insolvent corporation and the collection of unpaid stock subscriptions, where it alleges that the defendant stockholders induced the plaintiff to extend credit to it by falsely representing that its capital stock of $25,000 was fully paid up, when not to exceed $13,200 thereof had been subscribed, that defendants diverted and appropriated the capital stock, and that the corporation was insolvent, and a return of *nulla bona* had been made in another suit. *Barnard Mfg. Co. v. Ralston Milling Co*..... 659

COSTS:

1. COSTS—PREVAILING PARTY—SEPARATE CAUSES OF ACTION—APPORTIONMENT OF COSTS. The plaintiff, as prevailing party, is entitled to costs, under Rem. & Bal. Code, § 476, although one of its three causes of action failed and defendant secured therein an offset against the amount due on the other causes of action; there being no statute authorizing apportionment of costs in such cases. *Empire State Surety Co. v. Moran Brothers Co*..... 171

2. COSTS—DISMISSAL—DISCRETION—APPEAL—REVIEW. In dismissing an action without prejudice, it is discretionary for the court to allow costs to neither party; and the ruling will not be reversed except for manifest abuse of discretion. *Van Alstine v. Gray*.... 607

3. COSTS—ON APPEAL—APPORTIONMENT. Where a judgment in consolidated actions to foreclose loggers' liens was given against defendants for $534.89, for an eloignment of logs valued at $1,500, and on appeal the judgment was sustained in part, modified in part

COSTS—CONTINUED.

and reversed in part, seven lien claims to the extent of $212.15 being sustained, and an eloignment fund of only $660 in value, and the costs below on the seven claims not appearing in the record, the supreme court will apportion the costs in such arbitrary sum as appears from the whole record to be equitable; since the unsuccessful plaintiffs should not be charged with defendants' entire costs, which were largely incurred in an unsuccessful attack upon the seven claims sustained. *Akers v. Lord*..... 299

4. COSTS—EXPENSES OF LITIGATION—RECOVERY—SUBSEQUENT ACTION. A successful litigant cannot maintain a subsequent action to recover from his losing adversary the costs and expenses of the litigation, but must resort to his statutory right to have items thereof taxed as costs in the first action. *Perlus v. Silver*..... 338

CO-TENANCY:

See TENANCY IN COMMON.

COUNCIL:

Interest of councilmen in contract with city, see MUNICIPAL CORPORATIONS, 4.

COUNTIES:

Right to trial by impartial jury of county, see JURY.
Summons in tax foreclosure by county, see TAXATION, 4.

COURTS:

Review of decisions, see APPEAL AND ERROR; CERTIORARI.
Jurisdiction after appeal, see APPEAL AND ERROR, 14.
Mandamus to compel lower court to enter order, see APPEAL AND ERROR, 42.
Submission to arbitration by order of, see ARBITRATION AND AWARD.
Jurisdiction of petit larceny in city, see CRIMINAL LAW, 2.
Condemnation proceedings, see EMINENT DOMAIN.
Summoning jury, see JURY.
Mandamus to courts, see MANDAMUS.
Equitable jurisdiction to determine power of city to contract for improvement, see MUNICIPAL CORPORATIONS, 1.
Prohibition to courts, see PROHIBITION.
Subject and title of act creating police court and conferring jurisdiction of petit larceny, see STATUTES, 1.

1. COURTS—RULES OF DECISIONS —STARE DECISIS. The maxim *stare decisis* cannot be evoked as to matters merely discussed in an opinion, but not involved as essential elements. *Ingham v. Harper & Son*..... 286

2. COURTS—REVIEW OF ORDERS—VACATION OF JUDGMENT—NEW TRIAL—SECOND APPLICATION. After an alternative order refusing to vacate a

COURTS—CONTINUED.

judgment and grant a new trial unless costs are paid has become final and effective by defendants' failure to pay the costs within the time fixed, the trial court is without jurisdiction to entertain a second motion to vacate the judgment. *Green v. Russell*..... 379

3. COURTS—CREATION—JURISDICTION—LARCENY. Under Const., art. 4, § 1, vesting judicial power in certain courts, and such inferior courts as the legislature may provide, and art. 4, § 12, providing that the legislature shall prescribe the jurisdiction and powers of such inferior courts, the legislature had power by Rem. & Bal. Code, § 7656, to create police courts in cities of the second class, and by § 7657, to confer on them jurisdiction of petit larceny committed within the city. *State ex rel. Fugita v. Milroy*..... 592

COVENANTS:

Running with land, see VENDOR AND PURCHASER, 4, 5.

1. COVENANTS — QUIET ENJOYMENT — CONSTRUCTION — OUTSTANDING LEASE—RELATION—ESCROWS. Upon a sale of property under a written agreement to accept the premises subject to the "present tenancy," rents to be adjusted as of the date of delivery of the deed, which was done, the grantee thereafter collecting the rents, an action for breach of covenant for peaceable possession and quiet enjoyment by reason of an outstanding lease cannot be maintained, it appearing that the parties considered the tenancy and contracted with reference thereto. *Richardson v. Brower*..... 192

2. SAME — LEASE AS INCUMBRANCES — "EXISTING TENANCIES" — CONSTRUCTION—KNOWLEDGE—ATTORNMENT. An action for breach of covenant of warranty against incumbrances by reason of an outstanding lease cannot be maintained where the grantee had knowledge of the lease, and there was an attornment and apportionment of the rent at the time of the transfer. *Richardson v. Brower*..... 192

CREATION:

Of police courts, see COURTS, 3.

CREDIBILITY:

Of witness, see WITNESSES.

CREDITORS:

Rights as to chattel mortgage by debtor, see CHATTEL MORTGAGES.
Action by against stockholders of insolvent corporation, see CORPORATIONS, 14, 15.
Conveyances in fraud of, see FRAUDULENT CONVEYANCES.

CRIMINAL LAW:

See FORGERY; HOMICIDE; LIBEL AND SLANDER.
Jurisdiction of police courts, see COURTS, 3.
Pollution of streams, see FISH, 2.
Adulteration of milk, see FOOD.
Jurisdiction of police court over petit larceny, subject and title of act, see STATUTES, 1.
Cross-examination of accused, see WITNESSES.

1. CRIMINAL LAW—OFFENSES—CERTAINTY—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 2564, providing punishment for any person who edits printed matter which shall "tend to encourage disrespect for law" is not objectionable as uncertain in defining the nature of the crime. *State v. Fox*..... 185

2. CRIMINAL LAW—JURISDICTION—CHANGE OF PENALTY—LARCENY—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 7657, expressly conferring on police courts jurisdiction of petit larceny committed in the city, and limiting the jurisdiction in the case of misdemeanors to those punishable by fine not exceeding $500, or by imprisonment not exceeding six months, does not oust the court of jurisdiction in the case of petit larceny upon a subsequent change of penalty. *State ex rel. Fugita v. Milroy*..... 592

3. CRIMINAL LAW—TRIAL—RIGHT TO SPEEDY TRIAL—DISMISSAL—GOOD CAUSE FOR DELAY. Under Rem. & Bal. Code, § 2312, providing for the dismissal of a cause if not tried within sixty days after information filed, unless good cause to the contrary be shown, a dismissal is properly denied where the defendant filed a demurrer, and on the hearing thereof his counsel required more time than the court had at its disposal, and the arguments and trial were for that reason delayed for the accommodation of the defendant. *State v. Fox* 185

4. CRIMINAL LAW—TRIAL—ARGUMENT TO JURY—MISCONDUCT OF COUNSEL. It is not misconduct for a prosecuting attorney to address argumentative remarks to the jury if they are free from expressions of individual opinion as to the defendant's guilt independent of the testimony in the case. *State v. Peeples*..... 451

5. CRIMINAL LAW—TRIAL—CROSS-EXAMINATION OF DEFENDANT—SCOPE. Where accused offers himself as a witness, he submits himself to cross-examination to impair his credit, the same as any other witness. *State v. Peeples*..... 451

6. SAME—TRIAL—WRITTEN INSTRUCTIONS—WAIVER. A defendant in a felony case may waive the statutory requirement that the instructions to the jury be given in writing. *State v. Andrews*..... 181

7. CRIMINAL LAW—TRIAL—MISCONDUCT OF JUROR—SEPARATION—PREJUDICE. Under our statutes, Rem. & Bal. Code, § 2159, requiring jurors in criminal cases to be kept together, except in cases of mis-

CRIMINAL LAW—CONTINUED.

demeanors under Id., § 346, it is reversible error in a felony case for a juror to separate from his fellows, and it is not permissible for him to excuse his conduct and show that no prejudice resulted. *State v. Bennett*..... 673

8. SAME—SEPARATION OF JURY — WAIVER—OBJECTIONS—SUFFICIENCY. A separation of the jurors in a felony case, known to the court and objected to by the defendant at the time, is not waived because the objection or protest was technically insufficient or not put in apt words, and it can thereafter be raised on motion for a new trial. *State v. Bennett*..... 673

9. SAME—SENTENCE—MINIMUM FIXED BY STATUTES. An indeterminate sentence for a term of not less than ten years and not more than twenty years is beyond the power of the court where the maximum allowed was twenty years and the statute expressly limits the minimum term to "not less than six months nor more than five years." *State v. Andrews*..... 181

10. CRIMINAL LAW — APPEAL — EXCEPTIONS—NECESSITY. Instructions cannot be reviewed on appeal where no exceptions were taken, even where accused is defended by counsel appointed by the court. *State v. Andrews* 181

11. CRIMINAL LAW—APPEAL—HARMLESS ERROR. It is not prejudicial error to refuse to strike from an information the name of defendant's confederate and his aliases, where the matter objected to was heard at the trial without objection, although the confederate was dead. *State v. Ness*..... 334

12. CRIMINAL LAW—APPEAL—HARMLESS ERROR — EVIDENCE—QUESTION FOR COURT. In a prosecution for editing printed matter tending to encourage disrespect for the law, it is not prejudicial error that certain improper evidence was received to prove that the article tended to have that effect, where the printing was admitted and clearly on its face had that effect and incited the commission of crime; since it became the duty of the court to instruct the jury what the effect of the article was as a matter of law. *State v. Fox*..... 185

13. SAME—APPEAL—DECISION—REDUCTION OF SENTENCE. Where the trial court exceeds its power in imposing a sentence, the supreme court will not order a new trial, but will remand the case for the proper sentence. *State v. Andrews*..... 181

CROSS-EXAMINATION:

See WITNESSES.
Of accused, see CRIMINAL LAW, 5.

CROSSINGS:

Accident at railroad crossing, see RAILROADS.

CULVERTS:

Liability of city for defects, see MUNICIPAL CORPORATIONS, 23-25.

CUSTODY:

Of jury, see CRIMINAL LAW, 7, 8,
Of child, see DIVORCE, 6, 7.

DAMAGES:

Harmless error in using improper measure of damages, see APPEAL AND ERROR, 30.
Offset to purchaser through broker's violation of instructions, see BROKERS, 4.
On breach of contract, see CONTRACTS, 5, 6.
Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 5-11.
Indemnity for damages paid by reason of defective appliance, see INDEMNITY, 1, 5.
Liability of landlord for injury to leasehold by grading street, see LANDLORD AND TENANT, 3.
Recovery by tenant for leaky roof, after assuming obligation to repair, see LANDLORD AND TENANT, 4.
To property through obstruction in drain for stream, see MUNICIPAL CORPORATIONS, 23-25.
To leasehold by erection of pier for railroad bridge on harbor area, see NAVIGABLE WATERS.
Breach by seller of contract for sale of goods, see SALES, 2, 8.
Burden of proof on issue of raised by counterclaim, see TRIAL, 1.

1. DAMAGES—BREACH BY SELLER—MITIGATION OF DAMAGES. A purchaser of pedigreed stock, under an agreement whereby the seller was to furnish certificates of registration, is not bound to mitigate the damages by procuring the certificates, where the information necessary for an application for registration was in the exclusive possession of the seller. *Yamaoka v. Kloeber*..... 598

2. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. In an action for personal injuries, revived in favor of heirs upon the death of the plaintiff, in which the recovery is limited to the pain and suffering endured for nine months, a verdict for $10,000 is excessive, and should be reduced to $7,000. *Thompson v. Seattle, Renton & Southern R. Co.* 436

3. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $15,250, for a fracture of the hip joint, reduced by the trial court to $10,250, is still excessive, unless $2,500 is remitted, where there was considerable doubt and speculation as to the character of the injuries, the plaintiff walked six or eight blocks and back to see a physician six days after the accident, and there was no evidence that his earning capacity had been impaired. *Peterson v. Seattle Elec. Co.*..... 349

DAMAGES—CONTINUED.

4. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $1,000 is not excessive where plaintiff was severely injured by being struck by a boulder, two ribs were broken and he suffered other bruises. *Gasof v. Standard Ice Co*..... 537

5. DAMAGES—INJURY TO PROPERTY — EVIDENCE — SUFFICIENCY. It is error to grant a nonsuit in an action for damages to property, where it appears that defendant wrongfully took possession of new machinery without the consent of a conditional sales vendee, after being informed of plaintiff's title, and afterwards delivered it to the plaintiff in a worn out condition by reason of abuse and use; and it is not necessary that plaintiff show the exact damages alleged in the complaint. *United Iron Works v. Hurley Mason Co*..... 275

DEATH:

Of party to action ground for abatement, see ABATEMENT AND REVIVAL.
Cause of, sufficiency of evidence, see INSURANCE, 3.
Election between counts in action for, see PLEADING, 2.

1. DEATH — EVIDENCE — DEATH CERTIFICATE — FOREIGN STATUTES—PRESUMPTIONS. The presumption that the laws of a sister state are the same as our own, which provide that a death certificate filed with a county auditor shall be *prima facie* evidence of the facts recited, does not make a death certificate filed in a sister state *prima facie* evidence in the courts of this state. *Thompson v. Seattle, Renton & Southern R. Co*..... 436

2. DEATH—ACTIONS FOR WRONGFUL DEATH—PROOF OF MARRIAGE AND DEPENDENCY—EVIDENCE—SUFFICIENCY. In an action for wrongful death, there is sufficient evidence of marriage of the deceased and dependency, where his brother testified that he attended the wedding in a foreign country ten years before, that the ceremony was performed by a priest according to the customs of the country, and that the parties lived together until the deceased came to this country and that three children were born to them. *Koloff v. Chicago, Milwaukee & Puget Sound R. Co*..... 543

3. DEATH—ACTION FOR WRONGFUL DEATH—PROXIMATE CAUSE. Where the immediate cause of a death was pleurisy with effusion, following an accident, the proximate cause of the death was the cause that produced the pleurisy with effusion. *Thompson v. Seattle, Renton & Southern R. Co*..... 436

4. DEATH—ACTIONS FOR WRONGFUL DEATH—CONSOLIDATION—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 183, giving the heirs or personal representatives of one killed a right of action for wrongful death, authorizes but one suit, to be prosecuted in a single proceed-

DEATH—CONTINUED.

ing; hence separate actions by different heirs are properly consolidated. *Benson v. English Lumber Co.* 616

5. DEATH—ACTION BY ADMINISTRATOR—AUTHORITY—CONSENT OF BENEFICIARY—NECESSITY. In an action by an executor for wrongful death, brought for the benefit of the widow and children of the deceased, it must be shown that the widow has sanctioned and authorized the suit. *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.* 543

6. SAME—EVIDENCE OF CONSENT—ADMISSIBILITY. The consent of a widow to an action by an executor for the wrongful death of a husband cannot be shown by a letter written by the sister at her request, she being unable to write, asking her brother-in-law to send her money for the support of herself and children. *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.* 543

7. SAME—EVIDENCE OF CONSENT—FOREIGN DOCUMENTS—AUTHENTICATION. Such consent cannot be shown by a certificate of the mayor and secretary of a foreign city, which was not such as to constitute evidence at common law or under any state or Federal statute. *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.* 543

8. SAME — CONSENT OF WIDOW — FOREIGN ACKNOWLEDGMENT. Such consent cannot be shown by a paper purporting to be signed by the widow, her signature being authenticated only by an acknowledgment in sufficient form before the mayor of a foreign city using a seal; since proof of the execution should have been made by testimony or deposition. *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.* 543

DEBT:

Promise to pay debt of another, see CONTRACTS, 3; FRAUDS, STATUTE OF, 1.

Collection and preservation of decedent's debts by special administrator, see EXECUTORS AND ADMINISTRATORS, 2.

DEBTOR AND CREDITOR:

See FRAUDULENT CONVEYANCES.

DECEDENTS:

Estates, see EXECUTORS AND ADMINISTRATORS.

DECEIT:

See FRAUD.

DECISION:

Decisions reviewable, see APPEAL AND ERROR, 1-4.

On appeal, see APPEAL AND ERROR, 39-43; CRIMINAL LAW, 13.

Changing decision without notice, see JUDGMENT, 1.

DEDICATION:

Of streets, see MUNICIPAL CORPORATIONS, 18.

1. DEDICATION—STREETS—FEE. A city acquires only an easement in streets dedicated by a plat. *Rowe v. James*..... 267

DEEDS:

Covenants in deeds, see COVENANTS.
Parol evidence to vary writing, see EVIDENCE, 7.
Tax deeds, see TAXATION, 8.
Agreement to convey by warranty deed, see VENDOR AND PURCHASER, 4, 5.

1. DEEDS—DESCRIPTION—CONSTRUCTION—WHOLE INTEREST OR MOIETY. Where a grantor conveyed "his one-half undivided interest" in four lots "and" two other lots, in which last two he held the whole title, without specifying whether he intended to convey the whole or only a half interest in the last two lots, the deed must be construed to convey only a half interest therein, as against a subsequent *bona fide* purchaser. *Golden v. Pilchuck Tribe No. 42, Improved Order of Red Men*..... 581

2. DEEDS—AMBIGUITY—CONSTRUCTION AGAINST GRANTOR. A strict construction of a deed against a grantor will not be indulged where the description was not so ambiguous as to call for extrinsic aid, and other rules did not fall, and where no possession was taken under the deed. *Golden v. Pilchuck Tribe No. 42, Improved Order of Red Men*..... 581

3. DEEDS—RESERVATIONS—CONSTRUCTION. Where a grantor of the northeast quarter of a section reserved the right to itself and assigns to pass over the lands for hauling timber products and transporting logs and timber, and at the time the deed was made, it also owned the northwest quarter of the section, from which it had sold the timber with right of removal within five years, the intent of the reservation was to preserve its right to remove its timber from the northwest quarter, and was for the benefit of the purchaser of the timber, to whom the right reserved could be assigned. *Campbell Lumber Co. v. Deep River Logging Co*..... 70

DEFICIENCY:

General execution for, see EXECUTION.

DELAY:

Dismissal of prosecution for, see CRIMINAL LAW, 3.

DELIVERY:

Of check to agent of payee, see BANKS AND BANKING.

DEMAND:

Before action, see ACTION, 1.

DEMURRER:

In pleading, see PLEADING, 3.

DEPENDENCE:

Proof of, see DEATH, 2.

DEPOSITS IN COURT:

Conflicting claims to fund, see EMINENT DOMAIN, 11.

DESCRIPTION:

Of property conveyed, see DEEDS, 1, 2.
Of fishing location, see FISH, 1.

DILIGENCE:

In ascertaining newly discovered evidence, see NEW TRIAL, 2.
In rescinding contract, see SALES, 3.

DISCOUNT:

Of note by addition of new signatures, see ALTERATION OF INSTRUMENTS, 2.

DISCRETION:

In management of trust estate, see TRUSTS.

DISCRETION OF COURT:

Review of, see APPEAL AND ERROR, 23, 24.
To deny continuance, see CONTINUANCE.
Allowance of costs on dismissal of action, see COSTS, 2.
To order view of premises, see EMINENT DOMAIN, 14.
In refusing new trial, see NEW TRIAL, 3.
Amendment of answer, see PLEADING, 4.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see APPEAL AND ERROR, 3, 6.
Voluntary dismissal of action by attorney, see ATTORNEY AND CLIENT.
Costs on dismissal without prejudice, see COSTS, 2.
Dismissal of prosecution for delay, see CRIMINAL LAW, 3.

DIVORCE:

Jurisdiction of trial court after appeal, see APPEAL AND ERROR, 14.
Charging adultery in complaint as libel, see LIBEL AND SLANDER.
Change of venue for bias of judge, see VENUE.

1. DIVORCE—APPEAL—POWER OF APPELLATE COURT—PROTECTION PENDING APPEAL. The supreme court will not, pending appeal in a divorce case, restrain the husband from violence, in violation of an order restraining him, since adequate remedy is provided by statute. *Griffith v. Griffith*..... 56

DIVORCE—CONTINUED.

2. DIVORCE—APPEAL—PERFECTING APPEAL — RECORD — STATEMENT OF FACTS—JURISDICTION PENDING APPEAL. The superior court has jurisdiction, pending appeal in a divorce case, to order the defendant to return to the stenographer employed by him, the notes of the evidence so that they might be extended for the use of the plaintiff in preparing a statement of facts; in view of Rem. & Bal. Code, § 996, providing that on appeals in a divorce case, the superior court shall certify the evidence adduced at the trial, and Id., § 1731, providing that notwithstanding the appeal has been perfected, the superior court shall retain jurisdiction for the purpose of settlement and certifying bills of exception and statements of facts and for all purposes in so far as the cause is not affected by the appeal. *State ex rel. Griffith v. Superior Court*..... 386

3. DIVORCE—APPEAL — JURISDICTION — TEMPORARY ALIMONY. Under the constitution, limiting the original jurisdiction of the supreme court to special writs and to all other writs necessary and proper to the complete exercise of its appellate jurisdiction, the supreme court has no jurisdiction, pending an appeal in a divorce case to award the wife temporary alimony, suit money and attorney's fees for the prosecution of her appeal. *Griffith v. Griffith*..... 56

4. DIVORCE—APPEAL—JURISDICTION—TEMPORARY ALIMONY AND SUIT MONEY. Upon appeal by the wife from a judgment denying a divorce, the appellate court will, in aid of its appellate jurisdiction, award her temporary alimony and suit money for an efficient preparation of her case (Reversed on Rehearing). *Griffith v. Griffith* 56

5. SAME—ALLOWANCE FOR ALIMONY—SUIT MONEY. A wife in necessitous condition will be awarded temporary alimony of $20 per week for the support of herself and children, with possession of the family home, and $150 suit money and attorney's fees for prosecuting an appeal from a judgment denying a divorce, where there was evidence that the community owns property of the value of $30,000 or $40,000, which the defendant admitted was of the value of $5,000, over and above all indebtedness (Reversed on Rehearing). *Griffith v. Griffith*..... 56

6. DIVORCE — DECREE — CUSTODY OF CHILD — OPERATION AND EFFECT. Where a decree of divorce awarded the custody of one child to the wife and of one child to the husband, with the right to both parties to visit the children, and after the husband had sent his child outside of the state to its paternal grandparents, the court denied an application to modify the decree, but confirmed it, the original decree will not be interpreted as requiring that the child be kept within the jurisdiction of the court. *Bedolfe v. Bedolfe* 60

7. DIVORCE—CUSTODY OF CHILD—RIGHT OF VISITATION—MODIFICATION OF DECREE. Where the wife is denied the right to visit the child as

DIVORCE—CONTINUED.

provided in the decree, by reason of the hostility of the paternal grandparents having custody of the child, she may apply to the court of first instance for a modification of the decree or for a rule against the defendant for contempt; but the right to visit a child is not absolute and must yield to the welfare of the child. *Bedolfe v. Bedolfe* 60

8. DIVORCE—ALIMONY—SUPPORT OF CHILD—JURISDICTION TO MODIFY DECREE—PARTIES OUTSIDE STATE. The court granting a divorce and awarding periodical alimony for the support of a child retains jurisdiction to increase the future allowances, as to both the persons and the subject-matter, although both parties have since left the state, on service of notice on the defendant and the attorneys of record, no original process being necessary. *Harris v. Harris*.. 307

DOCUMENTS:

Foreign documents as evidence of consent of beneficiary to suit by executor for wrongful death, see DEATH, 7, 8.

As evidence in civil actions, see EVIDENCE, 1-4.

DRAINS:

Liability of city for defects or obstructions in, see MUNICIPAL CORPORATIONS, 23-25.

EASEMENTS:

See DEDICATION.

EJECTMENT:

Recovery of mineral lands, see MINES AND MINERALS.

ELECTION:

Harmless error in requiring or refusal to compel, see APPEAL AND ERROR, 28, 29.

Between counts in pleading, see PLEADING, 2.

Of remedies on breach of contract, see SALES, 2.

1. ELECTION—RESCISSION AND RECOUPMENT—PRESUMPTIONS—CHATTEL MORTGAGES—FORECLOSURE—DEFENSES. In an action to foreclose a chattel mortgage, the property being in the possession of the plaintiff, in which the defendant pleads a rescission for fraud and asks damages by way of recoupment, in the absence of an election it will be assumed that the defendant relies primarily on the defense of rescission. *Thompson v. Rhodehamel*..... 24

ELECTIONS:

Review of election contest, see CERTIORARI.

1. ELECTIONS—SPECIAL ELECTION—NOTICE—NECESSITY. Where no notice of a special election to fill a vacancy was given, as contemplated by statute, and a candidacy therefor was kept secret, thirteen votes by stickers, out of a total of thirty-two thousand electors vot-

ELECTIONS—CONTINUED.

ing for other officers at the general election, held at the same time, is not such an expression of the popular will as to amount to an election to such office, or such as would dispense with the necessity of giving notice of the special election for that office. *State ex rel. Sampson v. Superior Court*..... 484

ELECTRICITY:

Condemnation of property for electric power plant, see EMINENT DOMAIN, 1, 2, 4.

ELEVATORS:

Injury to passengers, see CARRIERS, 6-8.

EMINENT DOMAIN:

Mandamus to compel entry of order directing payment of award deposited in court, after reversal and remand on appeal, see APPEAL AND ERROR, 42.

1. EMINENT DOMAIN—PUBLIC USE—POWER PLANT—ELECTRIC LIGHT—PRIVATE AND PUBLIC PURPOSES. A condemnation for an electric power plant is for a public use, where the only present market for the power and the only present purpose was to furnish electric light for a town and its inhabitants; and it is immaterial that the petitioner was also authorized by its articles to sell power for all purposes, public and private; since these uses are separable. *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*..... 84

2. SAME—PUBLIC USE—NECESSITY. Condemnation for an 80 horse power plant, to furnish electric light to a town that has present need for only 30 horse power, is not excessive, in view of the probable growth of the town, where there is no intention to use the power for other than public use, except in such small quantities as to be insignificant and incidental to the main public purpose. *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*..... 84

3. SAME—PUBLIC USE—COMMERCIAL SIDE TRACKS—PRIVATE WAREHOUSE. In such case, it is immaterial that the city license to use the spur track was limited to the purpose of serving a commercial warehouse on private property, in view of Laws of 1911, p. 548, § 13, giving the right to maintain spurs for the use of a private shipper. *DeKay v. North Yakima & Valley R. Co*..... 648

4. SAME—PUBLIC NECESSITY — PRESUMPTIONS — EVIDENCE. In a condemnation for an electric light plant by a company having a franchise and under agreement to furnish a town with electric light, it will be presumed that the enterprise is in the interest of the public, and evidence that the plan is wasteful and that another plan would develop greater power from the same source does not establish that there is no public necessity for the plan proposed; since, under Rem. & Bal. Code, § 925, the court is to determine the question of neces-

EMINENT DOMAIN—CONTINUED.

sity, and can decide between the two plans when the occasion arises. *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*..... 84

5. EMINENT DOMAIN—DAMAGE TO PROPERTY—STEAM RAILROAD IN STREET. The building and operation of a steam railroad in a street under a city franchise is a damage to abutting property, within Const., art. 1, § 16, providing that no private property shall be taken or damaged for public or private purposes without just compensation. *Keil v. Grays Harbor & Puget Sound R. Co*..... 163

6. EMINENT DOMAIN—DAMAGES RECOVERABLE. Damages to abutting property by reason of the construction of a steam railroad in a city street must be confined to such physical injury as will depreciate its value at the time of the taking; danger from fire being only an element in so far as it depreciates value. *Keil v. Grays Harbor & Puget Sound R. Co*..... 163

7. EMINENT DOMAIN—RIGHT TO COMPENSATION—OPERATION OF RAILROAD—DAMNUM ABSQUE INJURIA. Noises, and the jarring of buildings and the casting of smoke and cinders on adjacent property, necessarily incident to the operation of a spur track on a railroad company's land, and the alley abutting thereon under license from the city is *damnum absque injuria*, and not a taking or damaging of the adjacent property. *DeKay v. North Yakima & Valley R. Co.* 648

8. EMINENT DOMAIN—PROCEEDINGS—DAMAGES—PROPERTY AND RIGHTS TAKEN. Where a riparian owner had granted the right to take water from the river limited to such quantity as would result in no damage to her fishery and fishing rights, she thereby conveyed all her water rights except as she reserved sufficient to protect her fishery and divested the lands of their character as riparian lands; hence, on condemnation of the rights of her subsequent lessee, no damages could be allowed for loss of riparian rights, although the lease purported to include riparian rights except as reserved for a fishery. *Northwestern Elec. Co. v. Lyle Light, Power & Water Co.* 384

9. SAME—ACTION FOR DAMAGES—DEFENSES—PERSONS LIABLE. In a common law action for damages to abutting property by the construction of a steam railroad in a city street, tried as a condemnation case with a judgment in that form, the damages being the same as in a condemnation suit which defendant should have commenced before the unlawful entry, the defense cannot be made that the injury was committed by the defendant as a construction company which built the road and has since transferred it; since defendant was a trespasser. *Keil v. Grays Harbor & Puget Sound R. Co*..... 163

10. EMINENT DOMAIN — COMPENSATION — EVIDENCE — SUFFICIENCY. A finding that a building condemned was worth $1,000, when the experts' highest estimate was $750 to $800, does not show that the

EMINENT DOMAIN—CONTINUED.

jury was prejudiced, considering the character, condition and uses to which it might be put and the fact that it would cost $1,285 to replace it. *Sedro-Woolley v. Willard*..... 646

11. EMINENT DOMAIN—COMPENSATION—CONFLICTING CLAIMS TO FUND IN COURT—PROCEEDINGS—APPEAL. Rem. & Bal. Code, § 898, providing that, in the event of conflicting claims to property condemned, the court may direct an action to be brought to determine the same, is not exclusive where the fund had been paid into court; and where all the parties appeared as upon an intervention and there was a trial on the merits, the court had jurisdiction to inquire into all the claims, and having done so, the supreme court on appeal can direct the proper judgment to be entered. *State ex rel. Smith v. Superior Court*..... 354

12. EMINENT DOMAIN—PROCEEDINGS—PREREQUISITE—ADOPTION OF PLAN OR LOCATION. Under Rem. & Bal. Code, § 925, making the question of public necessity in condemnation proceedings a question for the court to finally decide, a formal resolution by the corporation adopting the particular plan or location prayed for in the petition, is not essential, either to pleading or proof, as a prerequisite to an adjudication of public use, where the contest is between the relator and the landowner, and there is no question of priority between rival companies making time material; the filing of the petition being sufficient as against the landowner. *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*..... 84

13. SAME. The prosecution of condemnation proceedings for certain lands, instituted by an authorized attorney of the petitioner, is a ratification of the proceeding, and estops the petitioner from claiming that the action was unauthorized. *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*..... 84

14. EMINENT DOMAIN—PROCEEDINGS—VIEW. Rem. & Bal. Code, § 344, making it discretionary with the court to order a view of premises, applies to condemnation proceedings. *Sedro-Woolley v. Willard*. 646

15. EMINENT DOMAIN—PROCEEDINGS—APPEAL—REMAND. Where, in eminent domain proceedings to raise the waters of a lake for a reservoir, there was no evidence as to the height of the dam necessary, nor as to how much land would be flooded, the case will be remanded for a hearing and findings thereon. *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*..... 84

EMPLOYEES:

See MASTER AND SERVANT.

ENTRY:

Of judgment, see JUDGMENT, 1, 2.

EQUITY:

See PARTITION; QUIETING TITLE; TRUSTS.
Jurisdiction in injunction suit to determine power of city to contract for improvement, see MUNICIPAL CORPORATIONS, 1.

ESCROWS:

Deeds in escrow, see COVENANTS, 1.

ESTABLISHMENT:

Of mining claims, see MINES AND MINERALS.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.
Tenancy in common, see TENANCY IN COMMON.
Trusts, see TRUSTS.

ESTOPPEL:

Of corporation to question acts of officer, see CORPORATIONS, 7.
To deny authority of attorney to institute proceedings, see EMINENT DOMAIN, 13.
By judgment, see JUDGMENT, 4, 5.
To deny partnership, see PARTNERSHIP, 1.
By cotenant, see TENANCY IN COMMON.

1. ESTOPPEL — REPRESENTATIONS AS TO MATTERS OF LAW — TITLE TO PROPERTY. Where abutters on one side of the street, owning the entire fee, induced abutters on the other side, whose signatures were necessary, to sign a petition for vacation of the street by falsely representing that upon vacation all the abutters would take the fee in equal shares, they are estopped to assert their title to the entire street, where the misrepresentations were made with knowledge of their falsity, and were relied upon. *Rowe v. James*..... 267

EVICTION:

Of tenant of demised premises, see LANDLORD AND TENANT, 5.

EVIDENCE:

Objections for purpose of review, see APPEAL AND ERROR, 7-9.
Incorporation in record on appeal, see APPEAL AND ERROR, 17-20.
Harmless error in rulings on, see APPEAL AND ERROR, 31-33; CRIMINAL LAW, 12.
After remand of cause on appeal, see APPEAL AND ERROR, 43.
Negligence of drawer as to forged indorsement on check delivered to agent, see BANKS AND BANKING.
Of execution of note as principal makers, see BILLS AND NOTES.
For personal injuries, see CARRIERS, 6, 7, 9; STREET RAILROADS, 2-5.
To establish contract, see CONTRACTS, 1, 2.
For breach of contract, see CONTRACTS, 3, 6.

EVIDENCE—CONTINUED.

In action for contribution against part of makers of note, see CONTRIBUTION, 1, 2.
Of assignment of account by corporation, see CORPORATIONS, 9, 11.
To show corporate existence and payment of license fee, see CORPORATIONS, 10, 11.
Insolvency of corporation, see CORPORATIONS, 12, 13.
Of injury to property, see DAMAGES, 5.
In action for wrongful death, see DEATH, 1, 2, 6-8.
Condemnation proceedings, see EMINENT DOMAIN, 4, 10.
Of payment of note by deceased, see EXECUTORS AND ADMINISTRATORS, 6.
Of pollution of stream, see FISH, 2.
In prosecution for forgery, see FORGERY, 2.
Of fraud, sufficiency, see FRAUD.
Of other crimes, see HOMICIDE.
In action against indemnitor, see INDEMNITY, 5.
Cause of death, see INSURANCE, 3.
Of malice in charging crime, see MALICIOUS PROSECUTION.
For injuries to servant in general, see MASTER AND SERVANT, 1, 6, 7, 16, 17, 20, 22, 24-26.
Performance of extra work by contractor, see MUNICIPAL CORPORATIONS, 10.
Of damage to property by erection of pier for bridge across navigable water, see NAVIGABLE WATERS, 5, 6.
Newly discovered, ground for new trial, see NEW TRIAL, 2-4.
To show partnership, see PARTNERSHIP, 1.
Malpractice, see PHYSICIANS AND SURGEONS.
Negligence in injury to automobile at railroad crossing, see RAILROADS, 3.
In construing warranty on sale of goods, see SALES, 5.
Payment for goods sold, see SALES, 6.
Burden of proof in civil actions, see TRIAL, 1.
Reception at trial, objections, see TRIAL, 2.
Affidavits used at trial of civil action, see TRIAL, 11.
Abuse of discretion in management of trust estate, see TRUSTS.
Testimony of witnesses, see WITNESSES.
Cross-examination of accused as to other crimes, to impeach testimony, see WITNESSES.

1. EVIDENCE—PRODUCTION OF BOOKS. A foreign bank cannot, by demand for production of papers, be required to bring into court its books essential in the daily conduct of its business. *Bank of Commerce v. Newberry*..... 422

2. EVIDENCE—DOCUMENTARY EVIDENCE—LOST PAPERS—COPIES—IDENTIFICATION—SUFFICIENCY. The loss of an original affidavit is sufficiently shown to admit evidence of a copy, which several witnesses testified

EVIDENCE—CONTINUED.

was a true copy, where it appears that the original was filed as an exhibit at a former trial and officials in whose custody it should be testified that search had been made for it and it could not be found. *State v. Peeples*..... 451

3. EVIDENCE—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT—IMPLIED CONTRACT. Books of account, openly kept by a general manager of a corporation for five years during which he had full charge of the business, containing entries crediting himself with a monthly salary, are admissible as tending to show an implied contract to pay a reasonable sum for his services, when the books were open to the inspection of the officers and trustees of the corporation, who made no objection thereto except an objection to one raise in the salary. *Blom v. Blom Codfish Co*..... 41

4. SAME. Books of account, kept by a general manager of a corporation, are admissible for the purpose of showing the charges and credits against and in favor of the manager, since deceased, where, although not kept with the skill of an expert, they fairly show the transaction of the business covering a period of five years during which he was in control and the books had been at all times open to inspection of the officers, who made no objection thereto. *Blom v. Blom Codfish Co*..... 41

5. EVIDENCE—ORAL EVIDENCE—TO VARY WRITTEN CONTRACT. Proof of an oral promise by an accommodation indorser to pay the note and save another harmless is not inadmissible as varying the written obligation. *Handsaker v. Pedersen*..... 218

6. EVIDENCE—PAROL EVIDENCE TO VARY WRITING. Upon a sale of a stock of goods to a corporation, pursuant to a written offer and an acceptance in writing, by the specific terms of which the vendee was to pay for the goods by issuing its capital stock for $33,000, it is inadmissible to show by oral evidence that the vendee assumed an indebtedness of the vendor on a note given for money loaned and used in the business. *Mooney v. Mooney Co*..... 258

7. EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—SHOWING PERFORMANCE. In an action for damages for breach of a stipulation in a right of way deed to move a barn to a location "to be mutually agreed upon," oral evidence that at the time the deed was made the parties had orally agreed upon the location does not vary the terms of the writing, and it is admissible for the purpose of showing full performance of the agreement; since the writing did not contain the whole agreement of the parties. *Cerini v. Chicago, Milwaukee & Puget Sound R. Co*..... 310

8. EVIDENCE — PAROL EVIDENCE — OWNERSHIP OF PERSONAL PROPERTY. Title to personal property may be shown by parol evidence. *United Iron Works v. Hurley Mason Co*..... 275

EVIDENCE—CONTINUED.

9. EVIDENCE — ORAL EVIDENCE — CONTRACT NOT EXPRESSED IN WAREHOUSE RECEIPT. Where a warehouse receipt was signed by only one of the parties and mailed to the owner of the goods, oral evidence is admissible to prove an oral agreement as to the place where the goods should be stored and that the receipt did not express the agreement. *Gafford v. Globe Transfer & Storage Co.*..... 204

10. EVIDENCE — OPINION EVIDENCE — VALUES — QUALIFICATIONS OF EXPERTS. Property owners occupying their property and familiar with land values in the community, who are acquainted with a particular property, are qualified to express an opinion of its value, even if their estimate was higher than sales of other property; and their interest only affects their credibility. *Sedro-Woolley v. Willard*..... 646

EXAMINATION:

Of witnesses in general, see WITNESSES.

EXCAVATIONS:

Employees injured in excavation work, see MASTER AND SERVANT, 5.

EXCEPTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 8, 13, 21; CRIMINAL LAW, 10.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see APPEAL AND ERROR, 19, 20.

EXCESSIVE DAMAGES:

See DAMAGES, 2-4.

EXECUTION:

Supersedeas in aid of, see APPEAL AND ERROR, 16.
Of notes as principal makers, see BILLS AND NOTES.
Against other property to satisfy judgment *in rem* against property attached, see PROCESS.

1. EXECUTION—PROPERTY SUBJECT—ATTACHMENT—GENERAL EXECUTION FOR DEFICIENCY. Rem. & Bal. Code, § 668, providing that if the proceeds of attached property are insufficient to satisfy the judgment, the sheriff shall proceed to collect the balance as upon an execution in other cases, applies only where a personal judgment has been rendered which can be satisfied by general execution. *Clifford v. Pateros Transfer Co.*..... 665

EXECUTORS AND ADMINISTRATORS:

Action by executor for wrongful death, see DEATH, 5-8.
Testamentary trustees, see TRUSTS.

EXECUTORS AND ADMINISTRATORS—CONTINUED.

1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT—WAIVER OF RIGHT—RIGHT TO QUESTION—COLLATERAL ATTACK. An appointment of a suitable person as executor cannot be collaterally attacked by a third person, as having been made before the expiration of the forty days in which the widow and next of kin could apply, where they waived their right by failing to apply within the forty days. *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.*..... 543

2. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—PRESENTATION—SPECIAL ADMINISTRATORS—POWERS—"DEBTS." Under Rem. & Bal. Code, § 1420, authorizing the appointment of a special administrator under certain conditions "to collect and preserve the effects of the deceased," §§ 1421, 1422, requiring that he account for all goods, chattels, "debts" and effects and collect and preserve all goods, chattels and "debts," § 1423, providing that his duties shall cease upon granting letters testamentary or of administration, and § 1424, providing that he shall not be liable to an action by any creditor of the deceased, the word "debts" includes only debts owing to the deceased; and the object being only to preserve the estate pending formal administration, and every provision of law relating to claims against the estate being elsewhere treated, a claim presented to and rejected by a special administrator is of no effect and insufficient to prevent the running of the statute of nonclaim, Id., § 1479, providing that no action shall be maintained on a claim against the estate unless it shall have been first presented to the executor or administrator, which is mandatory. *Ward v. Magaha*..... 679

3. SAME—CLAIMS—FAILURE TO PRESENT—WAIVER—OBJECTION — HOW PASSED—PLEADING. The presentment of a claim against an estate under the statute of nonclaim is not entirely a matter of abatement, but a fact essential to a cause of action thereon, so that objection that no claim was filed may be first raised during the progress of the trial by the objection that the complaint does not state facts sufficient to constitute a cause of action. *Ward v. Magaha*..... 679

4. SAME—PRESENTMENT—WAIVER. An executor or administrator has no power to waive the statute of nonclaim, Rem. & Bal. Code, § 1479, providing that no holder of a claim against an estate shall maintain an action thereon unless the claim shall have been first presented (Overruling *Neis v. Farquharson*, 9 Wash. 508). *Ward v. Magaha* 679

5. EXECUTORS AND ADMINISTRATORS—SALES—CAVEAT EMPTOR. The rule of *caveat emptor* applied to administrator's sales where no rights of persons under disability are involved, applies only to want of power to sell, and does not prevent reliance on the title of the deceased at the time of his death, as disclosed by the records. *Golden v. Pilchuck Tribe No. 42, Improved Order of Red Men*..... 581

EXECUTORS AND ADMINISTRATORS—CONTINUED.

6. EXECUTORS AND ADMINISTRATORS — ACTION AGAINST EXECUTORS — NOTE OF DECEASED—PAYMENT—EVIDENCE—ADMISSIBILITY. In an action upon a note drawing 10 per cent interest, executed by the defendant's decedent in his lifetime, it is error to exclude evidence offered by the defense that the deceased was financially able to pay the note and was loaning money at from 6 to 8 per cent interest, and prior to his death assembled his children and divided his property among them, one of them being the wife of the plaintiff, and that entries in a book kept by the deceased at the time of the alleged payments of interest indicated that the payments were on the principal; especially where, at the time the note became due, six years' interest was paid in advance and no payment was made thereafter for sixteen years, when ten years' interest was paid, equaling the face of the note. *McAllister v. Chambers*..... 521

EXEMPTIONS:

From taxation, see TAXATION, 1-3.

EXPERT TESTIMONY:

In civil actions, see EVIDENCE, 10.

EXTRAS:

Claims for extra work required under city contract, see MUNICIPAL CORPORATIONS, 10, 11.

FACTORY ACT:

Guarding machinery under factory act, see MASTER AND SERVANT, 4.

FARES:

Franchise fixing half fare for school children, see CARRIERS, 1, 2.

FEES:

Of attorney in action on guaranty to pay note, see INDEMNITY, 3.

FELLOW SERVANTS:

See MASTER AND SERVANT, 11-17.

FILING:

Of complaint as commencement of action, see ACTION, 5.
Exceptions to findings of fact, see APPEAL AND ERROR, 21.

FINAL JUDGMENT:

Appealability, see APPEAL AND ERROR, 4.

FINAL ORDERS:

Jurisdiction to review, see COURTS, 2.

FINDINGS:

Exceptions to for purpose of review, see APPEAL AND ERROR, 21.
Review on appeal, see APPEAL AND ERROR, 26, 27.
Findings inconsistent with general verdict, see MASTER AND SERVANT, 3.
By court in civil actions, see TRIAL, 12.

FIRE INSURANCE:

See INSURANCE, 4-6.

FISH:

1. FISH—FISHERY RIGHTS—LOCATIONS—DESCRIPTION. A map for a fishing location sufficiently describes the location, within Rem. & Bal. Code, § 5214, where it fixes the upstream limit so that a person would have no trouble in locating it; and it is not necessary to describe the downstream limit, which the law fixes 300 feet distant. *Guinn v. Roelofs* 342

2. FISH—OFFENSES—POLLUTION OF STREAM—EVIDENCE—SUFFICIENCY. A conviction of polluting a stream, under Rem. & Bal. Code, § 5200, is sustained where it appears that the defendant was foreman of the only mill on the stream, and that sawdust was conveyed from the mill to the bank and allowed to escape into the stream in sufficient quantities to endanger the spawn and fish therein. *State v. Botchford* 114

FOOD:

1. FOOD—ADULTERATION—CRIMINAL PROSECUTION—LIABILITY OF AGENT OR MANAGER—INTENT—KNOWLEDGE. Under Rem. & Bal. Code, § 2513, providing a penalty for selling, or having in possession with intent to sell, milk below the standard fixed by law, regardless of guilty knowledge or criminal intent, the manager of a dairy corporation having general supervision of the mixing of the milk may be guilty of violation of the statute although he was not present when the milk left the dairy and had given instructions to keep it up to standard. *State v. Burnam* 199

2. SAME—CRIMINAL PROSECUTION—CONDITIONS PRECEDENT—SAMPLES—ANALYSIS—STATUTES—CONSTRUCTION. A compliance with Rem. & Bal. Code, § 5478, which makes it the duty of the person collecting samples of milk for analysis to send the result of the analysis within ten days to the person from whom the sample was taken or to the person responsible for the condition of the milk, is not a condition precedent to the prosecution of a person for violating the pure milk law, in view of other provisions of the law, Id., § 5468, providing for the delivery of samples of the milk taken and that no evidence of the analysis shall be given if such samples are not delivered on request, and § 5477, providing that a producer of milk is not liable unless the milk is taken upon his premises or while in his possession and a sealed sample thereof given to him. *State v. Burnam* 199

FORECLOSURE:

Presumption as to defense in absence of election in action to foreclose chattel mortgage, see ELECTION.
Of lien, see MECHANICS' LIENS.
Of tax lien by county, sufficiency of summons, see TAXATION, 4.

FORFEITURE:

Of salary of corporate officer, see CORPORATIONS, 6.

FORGERY:

Payment of forged check, see BANKS AND BANKING.
Cross-examination of accused as to other crimes, see WITNESSES.

1. FORGERY — JOINT PROSECUTION — ACTS AND "POSSESSION" OF CONSPIRATORS—COMMON DESIGN. It is no defense to a joint prosecution for knowingly having in possession a forged instrument with intent to utter it, that the instrument was taken from the actual possession of only one of the conspirators, where there was abundant evidence that they were acting in concert with a common criminal design. *State v. Andrews*..... 181

2. FORGERY—UTTERING—GUILTY KNOWLEDGE—EVIDENCE—SUFFICIENCY. In a prosecution for forgery, there was sufficient evidence that defendant had a guilty knowledge of the spurious character of the papers, a note and mortgage, and participated in their utterance, where it appears that he took the papers to be executed by a spurious grantor, made affidavit that he knew the family to aid in closing the loan, aided in cashing the checks, retaining commissions, and denied acquaintance with one of the guilty parties whom he had known for a long time. *State v. Peeples*..... 451

FORMER ADJUDICATION:

See JUDGMENT, 4, 5.

FRANCHISE:

Fixing half rate fare for school children, see CARRIERS, 1, 2.

FRAUD:

See FRAUDULENT CONVEYANCES; SALES, 1.
Joinder of assigned demands for, see ACTION, 2.
Assignment of cause of action for, see ASSIGNMENTS, 2.
Corporate officers, see CORPORATIONS, 3, 4, 6, 15, 16.
Of engineer in giving certificate on completion of contract, see MUNICIPAL CORPORATIONS, 12.
Agent, see PRINCIPAL AND AGENT, 2.
Sales of realty, see VENDOR AND PURCHASER, 1-3.

1. FRAUD—FALSE REPRESENTATIONS—SALE OF STOCK—EVIDENCE—SUFFICIENCY. In an action to recover damages for fraudulent representations inducing the plaintiff to sell corporate stock at less than its

FRAUD—CONTINUED.

value, a nonsuit is properly granted, where it appears that she did not rely upon the representations but employed an attorney to make an investigation and acted upon his advice after every opportunity to make an investigation, and that she made no complaint of the sale for three years. *Palmer v. Shields*..... 463

FRAUDS, STATUTE OF:

Contract with broker for commissions, see BROKERS, 1.

1. FRAUDS, STATUTE OF—DEBT OF ANOTHER—INDEPENDENT PROMISE. An oral promise by an accommodation indorser to pay the note in any event and save another harmless is not a promise to pay the debt of another, within the statute of frauds, but is an independent personal promise. *Handsaker v. Pedersen*..... 218

2. FRAUDS, STATUTE OF—EMPLOYMENT OF BROKER — SALE OF PERSONALTY—TRADE FOR LAND. A contract to pay a commission on the sale of a cafe, being for the sale of personal property, is not within the statute of frauds (Rem. & Bal. Code, § 5289), requiring an agreement employing an agent to sell or purchase real estate to be in writing, notwithstanding that the owner agreed to take part or all of his price in land, and the agent effected a trade of the cafe for land, which was consummated. *Merritt v. American Catering Co.* 425

3. FRAUDS, STATUTE OF. The statute of frauds being personal to the debtor, cannot be taken advantage of by sureties who guaranteed the performance of a lease which was voidable under the statute of frauds. *Backus v. Feeks*..... 508

FRAUDULENT CONVEYANCES:

1. FRAUDULENT CONVEYANCES—SALES IN BULK—VERIFIED STATEMENT OF CREDITORS—BURDEN OF PROOF. In an action against a buyer of a stock of goods in bulk, to recover upon an express contract to assume a promissory note of the vendor, the plaintiff need not prove affirmatively compliance with the sales in bulk law requiring a verified statement of the names and addresses of the creditors of the vendor; and there is no presumption that the law was not complied with. *Mooney v. Mooney Co*..... 258

FREE SPEECH:

Abridging right of, see CONSTITUTIONAL LAW.

GAME:

See FISH.

GUARANTY:

See INDEMNITY, 2-4.

1. GUARANTY — CONSIDERATION — GUARANTEEING A VOIDABLE LEASE. Since an unacknowledged lease for a term exceeding one year, where

GUARANTY—CONTINUED.

the tenant takes possession, is good as a lease from month to month until terminated by the statutory notice, it constitutes a sufficient consideration for the obligation of sureties in a bond given by the tenant conditioned that he perform all the covenants, agreements and obligations contained in the lease and save the lessor harmless from all loss by reason of its execution; and the bond guarantees the performance of the terms of the lease as written, since it was not an immoral or illegal contract or against public policy. *Backus v. Feeks*..... 508

2. GUARANTY—LIABILITY OF SURETY. Sureties in a bond, guaranteeing the performance of a contract which is not illegal or immoral, are bound by their guaranty although the contract cannot be enforced against the principal. *Backus v. Feeks*..... 508

HARBOR AREA:

Use of for railroad bridge, see NAVIGABLE WATERS, 2, 3.

HARMLESS ERROR:

In civil action, see APPEAL AND ERROR, 28-38.
In criminal prosecution, see CRIMINAL LAW, 11, 12.

HEIRS:

Redemption by minor heir, see TAXATION, 5-7.

HIGHWAYS:

1. HIGHWAYS—ABANDONMENT—FAILURE TO OPEN—USE BY RAILWAY. A street is open for public use to such an extent as to prevent its abandonment by nonuser, as provided in Rem. & Bal. Code, § 5673, where an electric railroad company, by virtue of a right of way deed, went upon it and set its location stakes and constructed its railway line in the street. *Clark v. Seattle*..... 316

2. SAME—NATURE OF USE. A county road is opened for public use, within the meaning of Rem. & Bal. Code, § 5673, relating to abandonment by nonuser, where the line of travel generally followed the dedicated way, although frequently in order to avoid hills and ravines, it departed from the road for short distances and again entered it. *Clark v. Seattle*..... 316

3. SAME—LIMITATION. Under Rem. & Bal. Code, § 5673, providing for the vacation of any county road which remains unopened for public use for five years after its authorization as a public highway, the five-year period begins to run from the date of the filing of a dedicated plat, and not from the date of its execution. *Clark v. Seattle*..... 316

HOMICIDE:

1. HOMICIDE—EVIDENCE OF OTHER CRIMES—MOTIVE. As evidence of another crime is admissible when it tends to establish motive, pos-

HOMICIDE—CONTINUED.

session by defendant of a burglar's jimmy may be shown in a prosecution for manslaughter, the defendant having shot and killed an officer when commanded to halt. *State v. Ness*..... 334

HOTELS:

Injury to guest using dark stairway, see NEGLIGENCE, 1.

HUSBAND AND WIFE:

See DIVORCE.

IDENTIFICATION:

Of lost papers, see EVIDENCE, 2.

IMPEACHMENT:

Of witness, see WITNESSES.

IMPROVEMENTS:

Liens, see MECHANICS' LIENS.
For development of water power, see MINES AND MINERALS.
Public improvements, see MUNICIPAL CORPORATIONS, 1-15.

INCUMBRANCES:

Lease as incumbrance, see COVENANTS, 2.

INDEMNITY:

See GUARANTY.
Indemnity insurance, see INSURANCE, 1.
Interest recoverable on earned premiums on policy of, see INTEREST, 1.

1. INDEMNITY—CONTRACT TO FURNISH APPLIANCES—DEFECTIVE APPLIANCES—DAMAGES PAID. Where a transportation company was compelled to compensate employees injured by reason of a defective hoisting appliance belonging to a shipper and which the shipper had supplied under a contract with the transportation company to furnish the same, the transportation company may recover over from the shipper for the sums paid out, if it received and used the appliances without notice of the defect. *Alaska Steamship Co. v. Pacific Coast Gypsum Co*..... 359

2. INDEMNITY—LIABILITY OF INDORSERS—ORAL PROMISE. An accommodation indorser who orally promised an accommodation signer to pay the note in any event and save such party harmless thereon, is liable on his promise. *Handsaker v. Pedersen*..... 218

3. INDEMNITY—ACTION ON GUARANTY—SCOPE—ATTORNEY'S FEES PAID WITHOUT SUIT. An action by accommodation signers, against an indorser who had agreed to pay the note in any event and save the plaintiffs harmless, is upon the promise and not upon the note, and no recovery can be had for the attorney's fee stipulated for in the

INDEMNITY—CONTINUED.

note, where the plaintiffs had paid the note without suit or costs. *Handsaker v. Pedersen*..... 218

4. INDEMNITY — ACTION ON GUARANTY — DEFENSES. In an action against an accommodation indorser upon the promise to pay the note in any event and save another harmless, it is no defense that plaintiff failed to prove a claim in bankruptcy against the estate of the makers; since the same obligation rested upon the defendant. *Handsaker v. Pedersen*..... 218

5. SAME — ACTION AGAINST INDEMNITOR — EVIDENCE — QUESTION FOR JURY. In such a case, whether the transportation company had notice of the defect, or acquiesced in the use of the defective appliance, is for the jury, where it appears that it made use of the same only at intervals of two to six weeks apart, that some weeks previous it had notice of a worn and defective condition of a tripping device which caused danger by premature dumping, but on the morning in question it had been used several hours without accident and it was at all times in the possession and control of the shipper. *Alaska Steamship Co. v. Pacific Coast Gypsum Co.*..... 359

INDORSEMENT:

Forged indorsement of payee's name on check, see BANKS AND BANKING.

Of bill of exchange or promissory note, see BILLS AND NOTES.

Liability of accommodation indorser upon promise to pay note, see INDEMNITY, 2-4.

INFANTS:

Custody and support on divorce of parents, see DIVORCE, 6, 7.

INFERIOR COURTS:

See COURTS, 3.

INJUNCTION:

Superseding temporary injunction, see APPEAL AND ERROR, 15.

Power of appellate court to restrain husband from violence pending appeal, see DIVORCE, 1.

Public improvements, see MUNICIPAL CORPORATIONS, 1.

INSOLVENCY:

Of corporation, see CORPORATIONS, 4, 12-16.

INSPECTION:

Duty to inspect appliances, see MASTER AND SERVANT, 8, 25.

INSTALLMENT:

Action for installment due on land contract, see VENDOR AND PURCHASER, 6.

INSTRUCTIONS:

Exceptions to, manner and time for taking, see APPEAL AND ERROR, 13.
Harmless error in rulings on, see APPEAL AND ERROR, 34-38.
Violation of by broker in purchasing wheat, see BROKERS, 3, 4.
In criminal prosecutions, see CRIMINAL LAW, 6, 10, 12.
In civil actions, see TRIAL, 4-10.

INSURANCE:

Interest recoverable on earned premiums on indemnity policy, see INTEREST, 1.

1. INSURANCE — INDEMNITY INSURANCE — POLICIES — CONSTRUCTION — "KIND OF TRADE OR BUSINESS" — "KIND OF WORK" — EMPLOYEES INCLUDED. A policy of indemnity insurance giving an employer compensation for injuries to servants whose compensation are included in the schedule on which the premiums are based, liberally construed in favor of the insured, includes under the heads of the schedule "Kind of trade or business" and "Kind of work" all who were engaged in the prosecution of the work at the specific places, and should not be restricted to the specific classes of artisans, as "shipbuilders," "blacksmiths" etc.; and also includes employees of a power, heat and light department, operating the entire plant; also, timekeepers whose duties took them about the places described, and drivers who were working about the premises part of the time, where the policy expressly excepted only the "Pres., Vice-Pres., Secty., Treas., & Clerical force." *Empire State Surety Co. v. Moran Brothers Co.*..... 171

2. INSURANCE — CANCELLATION OF POLICY — RETURN OF PREMIUMS — AGENTS' AUTHORITY — RATIFICATION — PRESUMPTION AS TO POLICY. Where insurance agents cancelled all outstanding policies and sent each policy holder, as return premium, a *pro rata* amount figured on the policy and premium if it had run the full term, at the same time notifying the company, which ratified the cancellation and return of premiums to the extent of the short rate, the acts of the agent are ratified and the company cannot insist on a settlement with the agents based on a short rate basis; it being presumed, in the absence of anything to the contrary, that the policy could not be cancelled by the company without returning a *pro rata* of the unearned premiums. *Hanford v. Toledo Fire & Marine Ins. Co.*.... 240

3. INSURANCE—ACCIDENT INSURANCE—CAUSE OF DEATH — EVIDENCE — SUFFICIENCY. In an action upon a policy insuring against death through accidental means, there is sufficient evidence to sustain a finding that the insured was killed by gas poisoning, where it appears that deceased, a strong, healthy man, was the general overseer of an incinerator, in which there occurred imperfect combustion causing smoke to escape to the room where deceased was working on Saturday, that he complained thereof, and was taken ill on Mon-

INSURANCE—CONTINUED.

day morning, and experts testified that his death was caused by gas poisoning. *Potter v. Aetna Life Ins. Co.* 374

4. INSURANCE—FIRE INSURANCE—PROOFS OF LOSS—WAIVER. The requirement that proofs of loss be furnished within sixty days after the fire, may be waived, although the conduct of the insurer constituting the waiver occurred subsequent to the time fixed in the policy for the proofs to be furnished. *Hatcher v. Sovereign Fire Assurance Co.* 79

5. SAME—PROOFS OF LOSS—WAIVER. Proofs of loss are waived where, in answer to the direct question whether any formal proofs of loss were wanted or would be waived, the agent answered in the affirmative and stated that they would waive formal proofs of loss. *Hatcher v. Sovereign Fire Assurance Co.* 79

6. SAME—PROOFS OF LOSS—WAIVER. The express waiver of formal proofs of loss is not affected by a stipulation that any action taken in investigating the fire and ascertaining the amount of damages shall not waive or invalidate any of the conditions of the policy or any rights of the parties; as the company could waive any right it had under the stipulation; and because the waiver is not inferred from any action in the investigation, etc. *Hatcher v. Sovereign Fire Assurance Co.* 79

INTENT:

As element of offense of adulterating milk, see FOOD, 1.

INTEREST:

As included in original amount in controversy, see APPEAL AND ERROR, 1.

1. INTEREST—ON BALANCE DUE ON CONTRACT—RECOVERY—DISPUTE AS TO AMOUNT. Interest is recoverable on earned premiums on an indemnity policy, from the date the balance becomes due, although the legal basis for the recovery was a subject of controversy; since the amount was due on a specific contract for the payment of money and was determinable by computation. *Empire State Surety Co. v. Moran Brothers Co.* 171

2. INTEREST—INSUFFICIENT TENDER. Where a tender was insufficient in amount, interest is recoverable on the amount due. *Kleeb v. McInturff* 419

JOINDER:

Of causes of action, see ACTION, 2.
Of actions, see PARTITION.

JOINT TENANCY:

See TENANCY IN COMMON.

JUDGES:

Mandamus to judge, see MANDAMUS, 1.
Change of venue for bias of, see VENUE.

JUDGMENT:

Entry of single decree on consolidation of actions, see ACTION, 3.
Review, see APPEAL AND ERROR.
Modification on appeal, see APPEAL AND ERROR, 40.
Decisions of courts in general, see COURTS.
Decree in divorce proceedings, see DIVORCE, 6-8.
Directing entry of on appeal, as to conflicting claims to property condemned, see EMINENT DOMAIN, 11.
General execution for deficiency, see EXECUTION.
On publication of summons from justice court, see PROCESS.

1. JUDGMENT—ENTRY—CHANGING DECISION WITHOUT NOTICE. After announcing an oral decision and causing the same to be entered upon the minutes, it is error to enter a decree contrary to the first decision, twenty-nine days later, on an *ex parte* application. *Schultz v. Schultz*..... 327

2. JUDGMENT—ENTRY NUNC PRO TUNC. Where no formal judgment was entered at the time the plaintiff took a voluntary dismissal, a formal judgment may later be entered *nunc pro tunc*. *Furman v. Bon Marche*..... 238

3. JUDGMENT—VACATION—GROUNDS. A motion to vacate a judgment, entered on the nonappearance of the defendant and his counsel at the trial, is properly denied, where it appears that both defendant and his attorney were neglectful, the defendant going east for several weeks without making inquiry about the case or keeping in touch with his attorney so that he did not get notice of the time set and the attorney's withdrawal from the case until after the trial. *Green v. Russell*..... 379

4. JUDGMENT—CONCLUSIVENESS — BAR — MATTERS CONCLUDED. Where disputes arose between parties to a contract, and one of them brought an action against the other for injunctive relief, damages, and general relief, the judgment is *res judicata* and a bar to another action upon the contract as to all matters in dispute that arose prior to the commencement of the first action. *Perlus v. Silver*..... 338

5. JUDGMENT—CONCLUSIVENESS—PERSONS AND MATTERS CONCLUDED. A judgment against part of the makers of a note, obtained by a bank as transferee, is not conclusive on the other makers that the bank was a holder in due course, in a subsequent action against them for contribution. *Peterson v. Nichols*..... 656

JUDICIAL SALES:

Of property of decedent, see EXECUTORS AND ADMINISTRATORS, 5.

JURISDICTION:

See ATTACHMENT; PROHIBITION.
Appellate jurisdiction, see APPEAL AND ERROR, 1-4.
Of trial court after appeal, see APPEAL AND ERROR, 14.
Of courts, see COURTS, 2, 3.
Criminal prosecutions, see CRIMINAL LAW, 2.
Of courts in divorce proceedings, see DIVORCE, 1-4, 8.
Restraining contract for public improvement, see MUNICIPAL CORPORATIONS, 1.

JURY:

Custody and conduct, see CRIMINAL LAW, 7, 8.
Instructions in criminal prosecutions, see CRIMINAL LAW, 6, 10, 12.
Findings inconsistent with general verdict, see MASTER AND SERVANT, 3.
Instructions in civil actions, see TRIAL, 4-10.

1. JURY—RIGHT TO JURY TRIAL—VENIRE—BODY OF COUNTY. A venire to summon a jury in a police court "from the body of your city" violates Const., art. 1, § 22, guaranteeing the right of trial by an impartial jury of the county; and since Rem. & Bal. Code, §§ 665, 679, and 1762, empowers police officers of a city to serve all processes from the police court in any part of the county, such a venire is not authorized by Id., § 69, conferring on a court all the means necessary to carry into effect jurisdiction conferred upon it. *State ex rel. Fugita v. Milroy*..... 592

JUSTICES OF THE PEACE.

Execution against property after service of process by publication in justice court, see PROCESS.

KNOWLEDGE:

Of grantee as to existence of outstanding lease, see COVENANTS, 2.
As element of offense of adulterating milk, see FOOD, 1.
Of spurious character of papers, see FORGERY.
As affecting assumption of risks by servant, see MASTER AND SERVANT, 10, 18, 19.

LANDLORD AND TENANT:

Outstanding lease as breach of covenant, see COVENANTS.
Bond guaranteeing voidable lease, see GUARANTY.
Damages to lessee of tide lands by erection of bridge across navigable waters, see NAVIGABLE WATERS, 2-6.

1. LANDLORD AND TENANT—SUBLEASE—ASSIGNMENT—ACQUISITION BY LANDLORD—LIABILITY FOR RENT. Upon a subletting for the full term, which is an assignment *pro tanto*, the landlord may acquire the interests of the subtenant without incurring any liability except for unpaid rent. *Hockersmith v. Sullivan*..... 244

LANDLORD AND TENANT—CONTINUED.

2. SAME — RELATION — TENANCY FROM MONTH TO MONTH. An unacknowledged lease for more than one year creates a tenancy from month to month only. *Hockersmith v. Sullivan*..... 244

3. LANDLORD AND TENANT—QUIET ENJOYMENT—ACTS OF WRONGDOERS. Inasmuch as a lease granting quiet enjoyment does not insure against third parties who are wrongdoers, the landlord is not liable for damages to the leasehold by reason of work done by a city in grading a street. *Hockersmith v. Sullivan*..... 244

4. SAME—REPAIRS—LIABILITY. Where the tenant assumes the obligation to repair the building, he cannot recover damages by reason of a leaky roof. *Hockersmith v. Sullivan*..... 244

5. SAME—EVICTION — INTERFERENCE WITH ENJOYMENT. A tenant in possession who pays rent cannot claim that the landlord's interference with his enjoyment during occupancy amounts to an eviction. *Hockersmith v. Sullivan*..... 244

LARCENY:

Jurisdiction of police courts, see COURTS, 3; CRIMINAL LAW, 2.
Subject and title of act creating police court and conferring jurisdiction of petit larceny, see STATUTES, 1.

LAST CLEAR CHANCE:

To avoid accident, see MUNICIPAL CORPORATIONS, 22; RAILROADS, 3; STREET RAILROADS, 3.

LAW OF THE CASE:

See APPEAL AND ERROR, 39.

LEASES:

See LANDLORD AND TENANT.

LEVY:

Right to compel levy for special assessment to pay for public work, see MUNICIPAL CORPORATIONS, 15.
Of taxes, see TAXATION, 1, 2.

LIBEL AND SLANDER:

1. LIBEL AND SLANDER — PRIVILEGE — ABSOLUTE PRIVILEGE — JUDICIAL PROCEEDINGS. Allegations in a complaint and affidavit in a divorce case charging adultery with a certain person are absolutely privileged if pertinent and relevant to the issue; and the rule of privilege is not changed by Rem. & Bal. Code, § 294, providing that every charge of adultery against a female shall be actionable "in the same manner as in the case of slanderous words charging a crime"; hence a complaint by the co-respondent for libel is demurrable, though the

LIBEL AND SLANDER—CONTINUED.

words are alleged to be false and malicious, where it is not charged that they were not pertinent and relevant to the issue. *Miller v. Gust* 139

LICENSES:

Payment of corporate license fee, see CORPORATIONS, 10-12.

LIENS:

See MECHANICS' LIENS.
Mortgage, see CHATTEL MORTGAGES; MORTGAGES.
For public improvements, see MUNICIPAL CORPORATIONS, 13, 14.
Tax lien, see TAXATION.

LIFE INSURANCE:

See INSURANCE, 2.

LIMITATION:

Vacation of county road by nonuser, see HIGHWAYS, 3.

LIMITATION OF ACTIONS:

1. LIMITATION OF ACTIONS—ACCOUNT—MUTUAL OPEN ACCOUNT. An account is a mutual, open account against which the statute of limitations does not run, where at no time six months intervened between any two payments; and it is immaterial that the books showing the charges were kept by one of the parties, where they were not his books, but were kept as general manager of a corporation, and the officers had access to the same. *Blom v. Blom Codfish Co.*... 41

LIVE STOCK:

Liability for trespass by, see TRESPASS.

LOCATION:

Adoption of as essential to adjudication of public use, see EMINENT DOMAIN, 12.
Description of fishing location, see FISH, 1.
Of mining claim, see MINES AND MINERALS.
Of pier head lines, see NAVIGABLE WATERS, 2.

LOST INSTRUMENTS:

Copies of as evidence, see EVIDENCE, 2.

MACHINERY:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 4, 7, 8, 12, 19, 25, 26.

MALICE:

In prosecution of offense, see MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION:

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—ADVICE OF COUNSEL—QUESTION FOR COURT. A gas company is not liable for a malicious prosecution of the plaintiff for stealing gas, and a nonsuit should have been directed, where it appears that its inspector was informed by two neighbors that the plaintiff was stealing gas, that he made an inspection, and discovered an unlawful connection by which gas was being used without being registered, that plaintiff admitted the existence of the connection, that the inspector truthfully communicated all the facts and circumstances within his knowledge to the prosecuting attorney, who advised and conducted the prosecution of the plaintiff; since probable cause then became a judicial question for the court, and under the facts probable cause was established. *Anderson v. Seattle Lighting Co*..... 155

2. SAME—MALICE—EVIDENCE—SUFFICIENCY. In such a case, there is no sufficient evidence of malice, where it appears that neither the inspector nor any of the defendant's officers knew the plaintiff or had any previous acquaintance with her. *Anderson v. Seattle Lighting Co.* 155

MALPRACTICE:

See PHYSICIANS AND SURGEONS.

MANDAMUS:

To lower court, to enter order directed, see APPEAL AND ERROR, 42.
To compel levy of special assessment to pay for public work, see MUNICIPAL CORPORATIONS, 15.

1. MANDAMUS—TO COURTS—WHEN LIES—CHANGE OF VENUE—REMEDY BY APPEAL. After the granting of a motion changing the venue to another county, mandamus does not lie to compel a modification of the order, changing the venue to another county; since error, if any, in the order can be reviewed on appeal from the final judgment, even if the orders were made by several judges or in several counties. *State ex rel. Furth v. Superior Court*..... 147

2. MANDAMUS—PROCEEDINGS—BURDEN OF PROOF. Upon application to the supreme court for a writ of mandamus, the applicant has the burden of proof, if the facts are denied, and must fail where he stands upon allegations put in issue without asking for a reference to determine the facts. *State ex rel. Ferguson v. Grady*..... 1

MANDATE:

To lower court on decision on appeal, see APPEAL AND ERROR, 40-43.

MANSLAUGHTER:

See HOMICIDE.

MAPS:

Description of fishing location, see FISH, 1.

MARRIAGE:

See DIVORCE.
Proof of, see DEATH, 2.

MASTER AND SERVANT:

Liability of carrier for assault on passenger by employee of ship, see CARRIERS, 3, 4.
Employees of corporation, see CORPORATIONS, 5, 6.
Indemnifying master for damages paid through use of defective appliance, see INDEMNITY, 1, 5.
Indemnity insurance, see INSURANCE, 1.
Liens for labor and materials, see MECHANICS' LIENS.

1. MASTER AND SERVANT—INJURY TO SERVANT—MEDICAL ATTENDANCE —COMPETENCY OF PHYSICIAN—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether an employer had provided a competent surgeon to treat a servant's injured knee, it is competent and relevant to show that the surgeon was holding himself out as an eye and nose specialist. *Klodek v. May Creek Logging Co*..... 573

2. SAME—FURNISHING MEDICAL ATTENDANCE — DEFENSES — SPECIAL CONTRACT. The fact that an employer in deducting hospital dues was acting under a contract with a hospital association and turned over all dues to it, does not relieve the master from liability for failure to provide proper medical attendance, under a special contract with the servant to do so. *Klodek v. May Creek Logging Co*... 573

3. SAME. While a finding, contrary to the evidence, that an employer retained part of the hospital dues, which it collected for a hospital association, is technically inconsistent with a general verdict for the plaintiff based on the fact that the hospital was the employer's agent, it is not hostile thereto, where the employer had made a special contract to provide medical attendance to injured workmen. *Klodek v. May Creek Logging Co*..... 573

4. MASTER AND SERVANT—SAFE PLACE—GUARDING DANGEROUS MACHINERY—FACTORY ACT—INSTRUCTIONS. In an action for personal injuries to an oiler, caught by a conveyor chain which was unguarded at a point where he was compelled to stoop and cross under it, the court is not called upon to give instructions upon the theory that the defendants had made an honest effort to guard the chain under the factory act, where there was no pretense that it was guarded at this point; and it is sufficient if the jury was instructed that the plaintiff cannot recover if the conveyor chain was reasonably safeguarded. *Sorenson v. Danaher Lumber Co*..... 38

MASTER AND SERVANT—CONTINUED.

5. MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE. An employer is not liable to a servant working in an excavation, and injured through the negligence of servants of another employer, working in a street above, in plowing up and rolling a boulder down into the excavation, where there was nothing to indicate that there was any danger from falling objects. *Gasof v. Standard Ice Co.*..... 537

6. MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE OF FOREMAN—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. Negligence of the defendant's foreman in dropping a brick upon and killing plaintiff's decedent is sufficiently shown where it appears that he was tossing the bricks around immediately above where he had set the men to work and that one of them fell, and that deceased was killed by the fall of a brick. *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.* 543

7. MASTER AND SERVANT—INJURY TO SERVANT—SAFE APPLIANCES—COMMON USE—QUESTION FOR JURY. Although the preponderance of the evidence shows that a "pin-and-ring" coupling is a safe and standard safety appliance for the equipment of railroad dump cars, where there was evidence that the nose or outward curve at the point of the pin did not insure the proper degree of safety and that the pins on the particular car were shorter than they should have been, and that a sudden tightening of the chain would have a tendency to throw the point out; the question should be submitted to the jury, even if it was not probable that the two chains could become uncoupled at the same time and from the same cause. *Melius v. Chicago, Milwaukee & Puget Sound R. Co.*..... 64

8. SAME—SAFE APPLIANCES—MASTER'S DUTY TO INSPECT. Where a defective hand car was used on a logging road for the purpose of transporting a track crew from place to place, the duty of inspection and furnishing safe instrumentalities is upon the master, and not upon a member of the crew who was not charged with the positive duty to keep it in repair; especially where several hand cars were supplied for the use of the men. *Rosellini v. Salsich Lumber Co.* 208

9. MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE—FAILURE TO SIGNAL. Where a hauling crew in a logging camp was out of the view of the tree fallers working in another place near the line, it is the nondelegable duty of the master to see that a warning is given before a tree is allowed to fall across the line in such a way that it is liable to injure members of the hauling crew. *Cunningham v. Adna Mill Co.*..... 111

10. MASTER AND SERVANT—INJURY TO SERVANT—DUTY TO WARN—UNKNOWN DANGER—ASSUMED RISKS. Where an experienced man in clearing land fastened a chain to a log to be dragged by a team, without knowing that the end of the log was attached to the

MASTER AND SERVANT—CONTINUED.

ground by the roots, causing the top to swing around and strike him while he was standing in the sweep of the top when the team started, the master owed no duty to warn him of the starting of the team; since he had an equal or better opportunity to know of the danger, which makes it one of the assumed risks of the business. *Hanson v. Shipley*..... 632

11. SAME—FELLOW SERVANT—FOREMAN IN CHARGE OF WORK—SAFETY OF PLACE—NECESSITY OF SUPERVISION—ASSUMPTION OF RISKS. Where a foreman negligently tossed bricks around immediately above the place where he had set men to work, killing a man, he infringed the duty of the master to furnish a safe place, and there is no question of fellow servants or assumption of risks involved. *Koloff v. Chicago, Milwaukee & Puget Sound R. Co*..... 543

12. SAME—SAFE APPLIANCES—FELLOW SERVANTS. No question of fellow servants arises, where the jury could find a violation of the master's primary duty to furnish a reasonably safe appliance. *Benson v. English Lumber Co*..... 616

13. SAME—FELLOW SERVANTS—ENGINEER AND TRACK WORKER ON TRAMWAY. An engineer operating a tramway engine and a tramway repairer, whose duty frequently took him to the engine house where he had every opportunity to observe the engineer in his work, are fellow servants, in regard to work in which the repairer was not under the control of the engineer, and with respect to matters not affecting the safety of the working place. *Larson v. Kieburtz* 231

14. MASTER AND SERVANT—FELLOW SERVANTS—DIFFERENT EMPLOYMENT. Fallers in a lumber camp working near the haul back line falling trees, out of view of the logging crew hauling out the logs, are not fellow servants of a rigging slinger engaged with the hauling crew, since the character of the employment is different. *Cunningham v. Adna Mill Co*..... 111

15. SAME—FELLOW SERVANTS—CONDUCTOR AND BRAKEMAN. A conductor of a dirt train engaged in remedying a defect in a dump car is not a fellow servant of a brakeman, assisting him and working under his direction, but is a vice principal. *Melius v. Chicago, Milwaukee & Puget Sound R. Co*..... 64

16. MASTER AND SERVANT—FELLOW SERVANTS—INCOMPETENCY—EVIDENCE—SUFFICIENCY. There is sufficient evidence of the incompetency of a man employed as a nozzleman with a hydraulic giant, working under a high pressure, where it appears that he had worked for thirty days with a short straight nozzle, which took no particular skill, that the employee was excitable, and upon putting on a deflector, which made the work dangerous and required an experienced and cool man to control it, he objected to using the deflector as a

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MASTER AND SERVANT—CONTINUED.

"newfangled arrangement" and too complicated; any evidence of inexperience being proof of incompetence where experience was necessary. *Emery v. Tacoma*..... 132

17. SAME—EMPLOYMENT OF INCOMPETENT FELLOW SERVANT—EVIDENCE OF NEGLIGENCE—SUFFICIENCY. Reasonable care in the employment of a nozzleman for a hydraulic giant equipped with a deflector, which would be dangerous if intrusted to an inexperienced man, is not shown by the fact that upon engaging him, he was asked if he had experience as a nozzleman and replied in the affirmative, where the nozzle then in use was a straight nozzle, which was simple and required no skill to control it, and he was not asked if he had had experience with a deflector. *Emery v. Tacoma*..... 132

18. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISKS—ASSUMING DANGEROUS POSITION. A tramway repairer assumes the risks where, for his own convenience, he rode on a loaded car not intended for passengers or employees to ride on; and he therefore cannot recover although the jury found that the engineer was negligent in the operation of the engine, his acts only endangering property and in no way affecting the safety of any place provided for employees to work. *Larson v. Kieburtz*..... 231

19. SAME—SAFE APPLIANCES—ASSUMPTION OF RISKS—RELIANCE ON ASSURANCE. The servant does not assume the risk of danger from the master's furnishing an appliance with inherent defects of which the servant had no knowledge, and which a superior servant assured him was all right. *Benson v. English Lumber Co*..... 616

20. MASTER AND SERVANT—METHODS OF WORK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. An employee assisting in loading lumber by attaching skidding tongs to timbers, is guilty of contributory negligence, as a matter of law, precluding recovery for injury to his hand, drawn into a block when he took hold of the wrong cable to slacken it, where, if he had looked he could have seen that it was the wrong cable, and would not have been injured but for his own mistake. *Gordon v. Ballard Lumber Co*..... 430

21. MASTER AND SERVANT—INJURY TO SERVANT—METHOD OF WORK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. An experienced brakeman on ordinary trains is not guilty of contributory negligence, as a matter of law, when working on a dirt train, in following the direction of the conductor to turn on the air by means of an angle cock at the side of the car, instead of going to one at the end of the car, where he had no reason to apprehend danger. *Melius v. Chicago, Milwaukee & Puget Sound R. Co*..... 64

22. SAME—CONTRIBUTORY NEGLIGENCE OF SERVANT—PROXIMATE CAUSE—EVIDENCE—QUESTION FOR JURY. Contributory negligence being an affirmative defense, with the burden of proof upon the defendant, and the question being for the jury where the testimony raises an

MASTER AND SERVANT—CONTINUED.

uncertainty upon which reasonable fair-minded men will differ, the court cannot say that a man employed in logging as a "chaser" was guilty of contributory negligence, as a matter of law, in standing where he was struck when a defective hook broke; since the proximate cause of the injury was for the jury, even if contributory negligence was a remote cause or a mere condition of it; and the court could not speculate as to the existence of any fact necessary to establish contributory negligence. *Benson v. English Lumber Co.* 616

23. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. It is for the jury to determine whether a rigging slinger was guilty of contributory negligence in standing in the bight of the cable while it was idle and the donkey engine was not applying power. *Cunningham v. Adna Mill Co.* 111

24. MASTER AND SERVANT—INJURIES—EVIDENCE—QUESTION FOR JURY. The question of the negligence of a logging company is for the jury, where it appears that, in hauling in a heavy log which struck a mound of earth, a steel hook broke, striking and killing a servant, and that the hook was made of an inferior grade of steel and had a defect known as a "cold shut," which could be easily detected by the blacksmith making it, and which made the hook much more liable to break than one properly made of high grade steel. *Benson v. English Lumber Co.* 616

25. SAME—CAUSE OF ACCIDENT—EVIDENCE—QUESTION FOR JURY—RES IPSA LOQUITUR. Where a hand car suddenly left the track, and the brasses upon the boxing of one of the front wheels came off just before or at the time the car left the track, and there was some evidence that it was the top brass that came off, which would allow the wheel to go out of place, there is sufficient evidence of the cause of the accident to make a *prima facie* case and to require the defendant, whose duty it was to inspect and furnish safe instrumentalities, to rebut the same by a reasonable explanation of the cause of the accident; and in such a case it is unnecessary to resort to the doctrine of *res ipsa loquitur*. *Rosellini v. Salsich Lumber Co.* 208

26. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES—ISSUES AND PROOF—EVIDENCE—RELEVANCY. In an action for personal injuries through the derailment of a hand car that suddenly left the track, evidence that one of the brasses upon the boxing of the front wheels fell out, just before or at the time the car left the track, is relevant to the issues raised by allegations that the car was old and generally worn out and unsafe to ride upon. *Rosellini v. Salsich Lumber Co.* 208

27. MASTER AND SERVANT—INJURY TO THIRD PERSONS—NEGLIGENCE. Where a contractor on street work knew that persons were working

MASTER AND SERVANT—CONTINUED.

in an excavation near the street line, he is liable for injuries caused by his servants' negligence in placing a rock where it rolled down and injured a man rightfully at work in the cut. *Gasof v. Standard Ice Co.* 537

MATERIALITY:

Of newly discovered evidence, see NEW TRIAL, 4.

MATERIALS:

Bonds to secure laborers and materialmen, see MUNICIPAL CORPORATIONS, 6-9.

Claims for labor and materials on public work, see MUNICIPAL CORPORATIONS, 14.

MEASURE OF DAMAGES:

On breach of contract, see CONTRACTS, 5, 6; SALES, 8.

To lessee of tide lands by erection of bridge across navigable water, see, NAVIGABLE WATERS, 4.

MECHANICS' LIENS:

Priority of mortgage over subsequent labor liens, see MORTGAGES.

1. MECHANICS' LIENS—LIENABLE ITEMS—LABOR PREPARATORY TO CONSTRUCTION. Rem. & Bal. Code, § 1129, giving a lien to every person performing labor in the construction, alteration or repair of any building, applies only to labor that goes into the finished structure, and does not cover labor in wrecking and removing a building on the lot preparatory to the construction of the new building, although that work was included in the contract for the new building. *Sound Transfer Co. v. Phinney Realty & Inv. Co.* 473

2. SAME. A lien for labor in wrecking and removing an old building on a lot preparatory to the erection of a new building cannot be claimed under Rem. & Bal. Code, § 1131, giving a lien to any contractor who clears, grades, fills in or otherwise improves the same. *Sound Transfer Co. v. Phinney Realty & Inv. Co.* 473

3. MECHANICS' LIENS—NOTICE—SERVICE. Under Rem. & Bal. Code, § 1150, a copy of the notice of a laborers' lien must be served upon the employer within thirty days after the same is filed for record, or the lien cannot be enforced. *Heal v. Evans Creek Coal & Coke Co.* 225

MEDICAL TREATMENT:

Furnishing medical attendance to injured workman, see MASTER AND SERVANT, 1-3.

MEETING OF MINDS:

See CONTRACTS, 2.

MILK:

Violation of pure milk law, see FOOD.

MINES AND MINERALS:

1. MINES AND MINERALS—LOCATIONS — ABANDONMENT — EVIDENCE—SUFFICIENCY. The evidence fails to show a legal establishment of placer mining claims, where it is evident that no actual discovery was made, the locations were not properly perfected nor labor done in compliance with the requirements of Rem. & Bal. Code, § 7367, the claims were abandoned more than one year prior to the commencement of an action to recover possession, and from the whole record, it appears that the attempted location was a speculative venture to prevent the use and development of a water power by others. *Spokane Portland Cement Co. v. Larson* 301

2. SAME. The fact that the major part of defendant's improvements were made after plaintiff's action was commenced is immaterial, where no attempt was made by plaintiff to prevent extensive improvements made in good faith. *Spokane Portland Cement Co. v. Larson* 301

MINORS:

Redemption by minor heir, see TAXATION, 5-7.

MISREPRESENTATION:

See FRAUD.
By officers or agents of corporation, see CORPORATIONS, 3, 4, 6, 15, 16.
Ground for estoppel, see ESTOPPEL.
Inducing sale, see SALES, 1.
Recovery of mony procured by, see VENDOR AND PURCHASER, 1-3.

MITIGATION:

Of damages, see DAMAGES, 1.

MODIFICATION:

Of divorce decree after appeal, see APPEAL AND ERROR, 14.
Of judgment or order on appeal, see APPEAL AND ERROR, 40.
Of decree in divorce, see DIVORCE, 7, 8.

MONEY RECEIVED:

Recovery of price paid for land, see VENDOR AND PURCHASER, 1-3.

MONTH:

Tenancy from month to month, see LANDLORD AND TENANT, 2.

MORTGAGES:

Personal property, see CHATTEL MORTGAGES.
Forgery of, see FORGERY.

MORTGAGES—CONTINUED.

1. MORTGAGES—VALIDITY — RECORDING — FUTURE ADVANCES — SUBSEQUENT LABOR LIENS. A mortgage to secure future advances is valid and takes precedence over laborers' liens for services performed after the mortgage is recorded. *Heal v. Evans Creek Coal & Coke Co.* 225

MOTIONS:

Opening or vacating judgment, see JUDGMENT, 3.
New trial in civil actions, see NEW TRIAL, 1.

MOTIVE:

Evidence to establish, see HOMICIDE.

MUNICIPAL CORPORATIONS:

Franchise ordinance fixing half rate fare for school children, see CARRIERS, 1, 2.
Creation and jurisdiction of police courts, see COURTS, 3.
Rights acquired in street dedicated by plat, see DEDICATION.
Operation of railroad in city street as damage to abutting property, see EMINENT DOMAIN, 3, 5-7, 9.
Liability of landlord for damages to leasehold by grading street, see LANDLORD AND TENANT, 3.
Subject and title of act creating police court and conferring jurisdiction of petit larceny, see STATUTES, 1.

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS — PROCEEDINGS—REVIEW—CONTRACTS—VALIDITY—JURISDICTION OF COURTS — EQUITY—INJUNCTION. The fact that the statute provides for objections to proceedings before a city council to provide for public improvements under the special assessment plan, with the right of appeal to the courts, does not deprive a court of equity of jurisdiction to determine, in an injunction suit, whether the city council had power to enter into a contract under its proceedings for such an improvement. *Gantenbein v. Pasco* 635

2. MUNICIPAL CORPORATIONS — PUBLIC WORKS — LETTING CONTRACT—PROCEEDINGS. A city can pass one or separate ordinances and let one or separate contracts for the construction of a water distributing system. *Gantenbein v. Pasco* 635

3. SAME—CONTRACTS—LOWEST BIDDER—FRAUD. In the absence of a showing of fraud, a contract for public improvements cannot be attacked because not let to the lowest bidder. *Gantenbein v. Pasco* 635

4. SAME—CONTRACTS — VALIDITY — INTEREST OF COUNCILMEN. Under Rem. & Bal. Code, § 7702, providing that no officer of any city shall be interested directly or indirectly in any contract with such city, a contract between a city and a reclamation company for a public water supply is void, where the contract provided that the water company should supply to landowners in a reclamation dis-

MUNICIPAL CORPORATIONS—CONTINUED.

trict outside the city an extra six inches of water per acre, free of charge, and three of the councilmen whose votes were necessary to authorize the contract were among such landowners and were benefited by the contract; since it was impossible to segregate their interests and leave the contract unimpaired. *Gantenbein v. Pasco* 635

5. SAME—CONTRACTS—VALIDITY—PUBLIC POLICY. Where a reclamation company had agreed to supply water to subscribers who were owners of property in a reclamation district outside of a city, which agreed supply was inadequate to properly irrigate the land, a contract between the city and the reclamation company for a public water supply for the city, in which the reclamation company agreed to furnish an extra six inches of water per acre to such subscribers, free of charge, is against public policy and void; since the city would be paying for the free water furnished to landowners outside the city. *Gantenbein v. Pasco*..... 635

6. MUNICIPAL CORPORATIONS—PUBLIC WORKS—BONDS TO SECURE LABORERS AND MATERIALMEN. A bond under Rem. & Bal. Code, § 1159, to indemnify laborers, mechanics, subcontractors, and materialmen, and all persons supplying such persons with provisions or supplies for carrying on the work, does not cover the cost of repairs upon the steam shovel used by the contractor in the prosecution of the work; since the statute is intended to cover only the things furnished and used directly in the work and entirely consumed thereby. *Standard Boiler Works v. National Surety Co*..... 28

7. MUNICIPAL CORPORATIONS — PUBLIC WORK — CONTRACTOR'S BOND—LIABILITY OF SURETIES—CONDITIONS PRECEDENT—NOTICE OF CLAIM—SUFFICIENCY. Letters from a materialman to a library board, informing the board of a balance due for materials furnished a contractor, and requesting prompt payment, without any reference to the contractor's bond, do not constitute notice to the city in compliance with Rem. & Bal. Code, § 1161, providing, as a condition precedent to action on the bond, that a written notice be filed with the board that the material has been furnished and that a claim is made against the board for the amount due. *Robinson Mfg. Co. v. Bradley* 611

8. SAME. Actual notice to part of sureties would not bind the other sureties. *Robinson Mfg. Co. v. Bradley*..... 611

9. SAME. Such statute is not complied with by actual notice given to the sureties, at a meeting of the library board, that the bill of the materialman for material furnished the contractor had not been paid; since the statute requires written notice of a claim upon the bond. *Robinson Mfg. Co. v. Bradley*..... 611

10. MUNICIPAL CORPORATIONS—PUBLIC WORK — CONTRACTS — PERFORMANCE OR BREACH—EXTRAS—EVIDENCE—SUFFICIENCY. In an action

MUNICIPAL CORPORATIONS—CONTINUED.

against a city on a contract for laying a sewer, the plaintiff is not entitled to recover for extra work through a change of grade, requiring the relaying of pipe, where it appears that the pipe had to be relaid because out of alignment in violation of the contract, and the change of grade was at the contractor's request and did not call for extra work under the plan under which he submitted his bid; especially where supplemental contracts waived all the extras contemplated by the parties at the time the work was done, and no claim for extras was made as required by a stipulation in the contract that such extras must be submitted previous to the final acceptance. *First National Bank v. Seattle*..... 122

11. SAME. The fact that the city allowed a claim for extras for relaying part of the pipe, does not entitle the plaintiff to a claim for extras for laying the balance. *First National Bank v. Seattle*.. 122

12. MUNICIPAL CORPORATIONS — IMPROVEMENTS — CONTRACTS—CERTIFICATE BY ENGINEER—EFFECT—FRAUD. Where a contract for public work placed the same under the complete charge of the city engineer, making him an arbitrator between the contractor and the city, and required him to supervise the work as it progressed, and on the completion of the work, to make final estimates and give a written certificate of the amount due, and that, upon the filing of such certificate, the city council should proceed to levy assessments therefor, the city is bound by the engineer's final certificate, even though it be fraudulently given, where the contractor did not participate in the fraud and was guilty of no collusion, and no complaint was made during the progress of the work. *State ex rel. Murphy v. Coleman*..... 15

13. MUNICIPAL CORPORATIONS—PUBLIC WORK—LIEN FOR SUPPLIES FURNISHED CONTRACTOR. In an action for supplies sold, against city contractors and a bank as their assignee of all moneys due and unpaid on the contract and retained by the city to satisfy liens filed against the contractor's bond, it is error to impress the remaining fund with a lien in favor of the plaintiff, as against the bank, where plaintiff had filed no lien against the same within the time required by law. *Larkin v. Pederson*..... 116

14. SAME—CLAIMS OF LABORERS—RIGHT TO BALANCE RETAINED. As between an assignee of a contractor, and a surety company, guaranteeing labor claims, under a city contract for public work providing that 70 per cent of the amount earned should be paid the contractor as the work progressed, and 30 per cent retained by the city to secure the payment of laborers and materialmen, any balance due to the contractor on the completion of the work after deducting 30 per cent must be applied to discharge unpaid labor claims in excess of the 30 per cent retained by the city for their security, where the contractor agreed to pay all such claims, and that the city might with-

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hold all payments until satisfied that all wages were paid, and the assignment recited that it was not valid against any claim for labor or materials. *First National Bank v. Seattle*..... 122

15. MUNICIPAL CORPORATIONS — IMPROVEMENTS — SPECIAL ASSESSMENTS —RIGHT TO COMPEL LEVY. A contractor on public work may maintain an action in mandamus to compel the city authorities to levy a special assessment to pay for the work, and is not compelled to resort to an action for damages for breach of the city's contract. *State ex rel. Murphy v. Coleman*..... 15

16. MUNICIPAL CORPORATIONS — STREETS — VACATION — STATUTES —IMPLIED REPEAL. The act of 1901, Rem. & Bal. Code, §§ 7840-7843, providing a complete method for the vacation of streets and alleys in some respects inconsistent with the earlier law, repeals by implication Id., § 7847, of the earlier act. *Rowe v. James*..... 267

17. SAME—OWNERSHIP ON VACATION—STATUTES. The act of 1901, Rem. & Bal. Code, § 7842, providing that, upon the vacation of a street, the fee should belong to the abutting owners, confers no rights where vested rights were acquired prior to the passage of the act, in view of § 4 of the act, Rem. & Bal. Code, § 7843, providing that no vested rights shall be affected by the act. *Rowe v. James*..... 267

18. MUNICIPAL CORPORATIONS—STREETS—VACATION—OWNERSHIP OF FEE —DEDICATION—PLATS. The general rule that abutters own the fee to the center of the street is controlled by the circumstances; and where an owner plats land bounded by a street included in the plat and owns nothing beyond the street, his conveyance of land abutting on the street carries the fee to the entire street; and vacation vests title to the entire street in such owner, *Rowe v. James*..... 267

19. SAME—STREETS—VACATION—RIGHTS. An abutting owner acquires no rights to the fee of a vacated street by reason of the payment of assessments for its maintenance and improvement. *Rowe v. James*..... 267

20. MUNICIPAL CORPORATIONS—USE OF STREETS—VIOLATION OF LAW—NEGLIGENCE. It is actionable negligence to drive an automobile on a city street at a rate of speed exceeding the speed limit and approach a pedestrian near an intersecting street without sounding an alarm, in violation of positive law. *Hillebrant v. Manz*..... 250

21. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A pedestrian struck by an automobile when about to board a street car waiting near a street intersection, is not guilty of contributory negligence, as a matter of law, where, before starting for the car, he looked back and saw no automobile in the street, and walked toward the street car without again turning to look back, in the absence of any sound of a horn or other warning; other witnesses also tes-

MUNICIPAL CORPORATIONS—CONTINUED.

tifying that the street was clear when he started for the car. *Hillebrant v. Manz*..... 250

22. SAME — PROXIMATE CAUSE — CONTRIBUTORY NEGLIGENCE — LAST CLEAR CHANCE. Failure to look back after leaving the curb, even if contributory negligence, does not preclude a recovery where the defendant, driving an automobile, could have seen the plaintiff and avoided the accident if he had been running at a reasonable rate of speed or sounded a horn. *Hillebrant v. Manz*..... 250

23. MUNICIPAL CORPORATIONS—STREAMS—OBSTRUCTION—DEFECTIVE CULVERTS—LIABILITY OF CITY. Where a fill and culvert is constructed across a natural water course, the city must make adequate provisions to care for the water of the stream, including ordinary freshets that could reasonably be anticipated, and is liable for damages to property where, after notice that the culvert had become inadequate through decay or obstructions, it failed to remedy the defect. *Ronkosky v. Tacoma*..... 148

24. SAME—SURFACE WATERS—DRAINS—DUTY OF CITY. A city having constructed an adequate culvert to drain off surface water, must exercise reasonable care to maintain the same in a suitable condition to perform its function. *Ronkosky v. Tacoma*..... 148

25. SAME — STREAMS — OBSTRUCTION — ACTION FOR DAMAGES — NEGLIGENCE—QUESTION FOR JURY. Where a city culvert became clogged up, obstructing a natural stream until buildings were floated in forty-five feet of water, allowing the water to go out with a rush when the city cut away a cribbing, demolishing the buildings, whether the city was negligent in causing the water to go out with unnecessary suddeness, and the damages suffered thereby, are questions for the jury. *Ronkosky v. Tacoma*..... 148

MURDER:

See HOMICIDE.

NAMES:

Of owner in summons for tax foreclosure, see TAXATION, 4.

NAVIGABLE WATERS:

1. NAVIGABLE WATERS—ERECTION OF STRUCTURES—AUTHORITY. Private individuals may, by consent of the Federal and state governments, erect structures in the navigable waters of the state. *Wilson v. Oregon-Washington R. & Nav. Co*..... 102

2. NAVIGABLE WATERS—HARBOR LINES AND AREAS—LOCATION OF PIERS —DAMAGES TO ABUTTERS—RIGHTS OF LESSEES. Since the state owns the beds and shores of navigable waters, under Const., art. 16, § 1, and is prohibited from giving any rights to private persons in waters beyond harbor lines established pursuant to art. 15, § 1, the state

NAVIGABLE WATERS—CONTINUED.

may establish pier head lines beyond the harbor lines, whenever it pleases; and hence a lessee of the state of abutting tide lands cannot show the establishment or change of pier head lines at locations advantageous to his leasehold for the purpose of enhancing the value thereof, in an action to recover for damages thereto. *Wilson v. Oregon-Washington R. & Nav. Co*..... 102

3. NAVIGABLE WATERS—OBSTRUCTIONS—DAMAGE TO ABUTTER BY ERECTION OF BRIDGE—HARBOR AREA—USE. Where a pier for a railroad bridge across navigable water was placed on harbor area which the railroad company had leased from the state, any damage it might do to an adjoining owner by causing the water to shoal in front of such owner is *damnum absque injuria;* since it was caused by the lawful use of the railroad company's property. *Wilson v. Oregon-Washington R. & Nav. Co*..... 102

4. NAVIGABLE WATERS—OBSTRUCTION BY BRIDGE—DAMAGE TO ABUTTERS—MEASURE OF DAMAGES. In an action by the lessee of tide lands, for damages by reason of the erecting of a railroad bridge across navigable water, the plaintiff may recover all damages caused to his property in so far as it differs in kind from the damages to other property generally; as in rendering the property less convenient of access by reason of its close proximity, but not for damage by the necessity of passing through a draw, inflicted on all property alike; hence the difference in value before and after the erection of the bridge is not the true measure of damages. *Wilson v. Oregon-Washington R. & Nav. Co*..... 102

5. NAVIGABLE WATERS—OBSTRUCTION—INJURY TO ABUTTERS—DAMAGES—EVIDENCE—REMOTENESS. Opinion evidence that a pier for a railroad bridge would cause the water to shoal in front of adjoining property is too remote and speculative to show damages to such property; although if such damages actually occur in the future, compensation therefor may be recovered. *Wilson v. Oregon-Washington R. & Nav. Co*..... 102

6. SAME—ACTION FOR DAMAGES—TRIAL—INSTRUCTIONS—EVIDENCE. In an action by a lessee of tide lands for damages to his property by the construction of a railroad bridge across navigable water, error in the admission of evidence to show the value of the land before and after the erection of the bridge is not cured by an instruction that damages could not be recovered for an interference with the navigation of the river, where the testimony failed to show what portion of the decreased value was due to the manner in which the bridge was constructed, and what portion to hindrance in navigation. *Wilson v. Oregon-Washington R. & Nav. Co*..... 102

NECESSITY:

Of record for purpose of review, see APPEAL AND ERROR, 18, 19.
Of exceptions for purpose of review, see CRIMINAL LAW, 10.

NECESSITY—CONTINUED.

To show authority of executor to bring suit for wrongful death, see DEATH, 5.
Notice of special election to fill vacancy, see ELECTIONS.
Public necessity for condemnation of property, see EMINENT DOMAIN, 2, 4, 12.
Levy of tax, see TAXATION, 2.
Pleading tender of reconveyance in action for money procured by fraud, see VENDOR AND PURCHASER, 3.

NEGLIGENCE:

Of drawer of check, as to forged indorsement, see BANKS AND BANKING.
In carriage of passengers, see CARRIERS, 3-6.
Of passenger, see CARRIERS, 7-9.
Measure of damages, see DAMAGES, 2-4.
Causing death, see DEATH.
Of employers, see MASTER AND SERVANT.
Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 20-23.
Driving automobile on city street, see MUNICIPAL CORPORATIONS, 20.
Of person injured on street, see MUNICIPAL CORPORATIONS, 21, 22.
Of city in maintaining defective culvert, see MUNICIPAL CORPORATIONS, 23-25.
In treating patient, see PHYSICIANS AND SURGEONS.
Of engineer in operation of train, see RAILROADS, 3.
In operation of street cars, see STREET RAILROADS.
Of person injured by operation of street railroad, see STREET RAILROADS, 2, 4-8.

1. NEGLIGENCE—DANGEROUS PREMISES — HOTELS — DARKENED STAIRWAY—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS. A guest in a hotel is not guilty of contributory negligence *per se* and does not assume the risks, in the mere use of a darkened stairway, made necessary because the elevator was not in commission, where there was no defect in the construction of the building, which was of modern construction, but merely a neglect on the part of the owner to use lights which had been provided. *Ritter v. Norman*..... 563

2. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS. It is error to assume in an instruction in an action for personal injuries that the defense of contributory negligence must be established by the evidence introduced by the defendant. *Atwood v. Washington Water Power Co*..... 518

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE:

Ground for new trial in civil actions, see NEW TRIAL, 2-4.

NEW TRIAL:

Review of discretion in granting, see APPEAL AND ERROR, 24.
Remand of cause for on appeal, see APPEAL AND ERROR, 40, 41.
Jurisdiction to entertain second application for, see COURTS, 2.

1. NEW TRIAL — SECOND APPLICATION — MOTION TO EXTEND TIME. Where an order for a new trial is made conditional upon payment of costs within a limited time, a motion to extend the time made after default is too late, as it would be in effect granting permission to interpose a second motion for a new trial. *Green v. Russell*.. 379

2. NEW TRIAL — NEWLY DISCOVERED EVIDENCE — DILIGENCE. A new trial for newly discovered evidence is properly refused where there was no request for a continuance and no showing of diligence in procuring a witness who was found within a very few days after the trial. *Spokane Portland Cement Co. v. Larson*..... 301

3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT. It is not an abuse of discretion to refuse a new trial on the ground of the newly discovered evidence of a witness who would testify, in contradiction of several witnesses, that plaintiff had told him several years before that he was ruptured and unable to do hard work, where the same was contradicted by counter affidavits, and it is not probable that the evidence would change the result. *Hazlett v. Seattle Elec. Co*..... 377

4. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MATERIALTY. It is not error to refuse plaintiff a new trial for newly discovered evidence as to defendant's negligence, when the case was properly dismissed because of plaintiff's contributory negligence. *Armstrong v. Spokane & Inland Empire R. Co*..... 624

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

See ELECTIONS.
Increasing future allowance for support of child, see DIVORCE, 8.
Changing decision without notice, see JUDGMENT, 1.
Of liens, time for filing, see MECHANICS' LIENS, 3.
To city of claim for material furnished contractor, see MUNICIPAL CORPORATIONS, 7-9.
Of action, see PROCESS.
Purchaser of real property, see VENDOR AND PURCHASER, 8.

OBJECTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 7-12.
To failure to present claim against estate, see EXECUTORS AND ADMINISTRATORS, 3.
To assessment for public improvements, see MUNICIPAL CORPORATIONS, 1.
To pleadings raised by demurrer, see PLEADING, 3.
To evidence, see TRIAL, 2.

OBSTRUCTIONS:

Of stream by defective city culvert, see MUNICIPAL CORPORATIONS, 23-25.
Of navigable waters, see NAVIGABLE WATERS, 3-6.

OFFICERS:

Corporate officers, see CORPORATIONS, 3-9.
Municipal officers, interest in contract with city, see MUNICIPAL CORPORATIONS, 4.

OPEN AND CLOSE:

Right to open and close civil action, see TRIAL, 1.

OPENING:

Road or street for public use, see HIGHWAYS.

OPINION EVIDENCE:

In civil actions, see EVIDENCE, 10.
As to damage to property from construction of pier for bridge, see NAVIGABLE WATERS, 5.

OPTION:

Assignment of rights under, see ASSIGNMENTS, 1.
To purchase lands, see VENDOR AND PURCHASER, 7.

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.
Promise of accommodation indorser to pay note, see INDEMNITY, 2-4.

ORAL INSTRUCTIONS:

See TRIAL, 7, 8.

ORDERS:

Review of, see APPEAL AND ERROR, 4, 6.
Prohibition to prevent enforcement of, see PROHIBITION.

ORDINANCES:

Franchise ordinance fixing half rate fare for school children, see CARRIERS, 1, 2.

OWNERSHIP:

Title to vacated street, see MUNICIPAL CORPORATIONS, 17-19.

PARENT AND CHILD:

Custody of children on divorce, see DIVORCE, 6, 7.

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PAROL EVIDENCE:

In civil actions, see EVIDENCE, 5-9.

PARTIES:

Death ground for abatement, see ABATEMENT AND REVIVAL.
Capacity to sue, see ACTION, 4.
To action on assigned claims for fraud, see ASSIGNMENTS, 3.
Absence of, ground for continuance, see CONTINUANCE, 1.
Rights and liabilities as to costs, see COSTS.
Persons concluded by judgment, see JUDGMENT, 5.
Persons entitled to mechanics' lien, see MECHANICS' LIENS.
Entitled to compel levy of special assessment to pay for public work, see MUNICIPAL CORPORATIONS, 15.
Entitled to exercise minor's right of redemption from tax sale, see TAXATION, 7.
Cotenants, see TENANCY IN COMMON.

PARTITION:

1. PARTITION—ACTIONS—JOINDER—QUIETING TITLE — RELIEF. Rights of action to quiet title and for a partition may be united in one action, under Rem. & Bal. Code, § 844, providing that in partition, the rights of the several parties may be determined. *Crowley v. Byrne* 444

PARTNERSHIP:

Agency agreement distinguished from partnership, see PRINCIPAL AND AGENT, 1.

1. PARTNERSHIP—ESTOPPEL TO DENY — EVIDENCE — SUFFICIENCY. Defendants, who were box manufacturers, are not estopped to deny that their selling agency, created with limited power to sell goods and fix prices, was not a partnership, and the plaintiff, a box manufacturer who sold the agency goods, is sufficiently shown to have had notice of the nature of the agency and its powers, where it appears that it was invited to join in the creation of the agency, its sales manager saw the written agreement limiting the powers of the agency, and its officers fully considered the proposition and declined to enter into the arrangement; there being no evidence that the defendants held themselves out as partners. *National Lumber & Box Co. v. Grays Harbor Commercial Co.* 31

PARTNERSHIP—CONTINUED.

2. PARTNERSHIP—SALES—PARTNERS — LIABILITY OF PARTNERS—SALES TO FIRM. An undisclosed partner in a contract to purchase goods is liable on the sale, regardless of whether the sale was made upon the faith of his credit or with knowledge of the partnership relation. *Pacific Drug Co. v. Hamilton*..... 469

PASSENGERS:

Carriage of, see CARRIERS.

PAYMENT:

Of check on forged indorsement, see BANKS AND BANKING.
For corporate stock, see CORPORATIONS, 1.
Of corporate license fee, see CORPORATIONS, 10-12.
Of note by deceased, see EXECUTORS AND ADMINISTRATORS, 6.
Of assessment by abutting owner as conferring right to fee of vacated street, see MUNICIPAL CORPORATIONS, 19.
Price of goods sold, see SALES, 6.
Of taxes by joint owner as notice to purchaser, see VENDOR AND PURCHASER, 8.

PENALTIES:

Change of as affecting jurisdiction, see CRIMINAL LAW, 2.

PERFORMANCE:

Of contract entitling broker to commissions, see BROKERS.
Of contract for public work, see MUNICIPAL CORPORATIONS, 10.
Of option to purchase, when title passes, see VENDOR AND PURCHASER, 7.

PERSONAL INJURIES:

See NEGLIGENCE.
Survival of action for death occasioned by, see ABATEMENT AND REVIVAL.
To passengers, see CARRIERS, 3-9.
Damages for, see DAMAGES, 2-4.
To employee, see MASTER AND SERVANT.
To person on city street, see MUNICIPAL CORPORATIONS, 20-22.
To person on or near street railroad track, see STREET RAILROADS.

PHYSICIANS AND SURGEONS:

Providing medical attendance for injured workman, see MASTER AND SERVANT, 1-3.

1. PHYSICIANS AND SURGEONS—MALPRACTICE—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. Whether surgeons were negligent in failing to remove all of the packing and to stop a hemorrhage, following a surgical operation on plaintiff's nose, is for the jury, where there was evidence tending to show that they failed to do so, and that a speedy recovery followed on its removal by another surgeon. *Williams v. Wurdemann*..... 390

PHYSICIANS AND SURGEONS—CONTINUED.

2. SAME—DEFENSES — CONTRIBUTORY NEGLIGENCE. Where a patient has been improperly treated, he may quit the treatment at any time, and it is no defense to an action for malpractice that the patient did not return for further treatment, when he found he was not getting along as he should, notwithstanding it was highly probable that had he done so, the treatment would have been changed and a cure effected. *Williams v. Wurdemann*..... 390

PIERS:

Establishment of pier head lines by state, see NAVIGABLE WATERS, 2.

PLANS:

Adoption of as essential to adjudication of public use, see EMINENT DOMAIN, 12.

PLATS:

Rights acquired in street dedicated by plat, see DEDICATION.
Dedication of streets, see MUNICIPAL CORPORATIONS, 18.

PLEADING:

Allegations of complaint as determining amount in controversy, see APPEAL AND ERROR, 2.
Objections for purpose of review, see APPEAL AND ERROR, 7.
Alleging grounds for receiver of insolvent corporation, see CORPORATIONS, 16.
Charging adultery in complaint for divorce as absolute privilege, see LIBEL AND SLANDER.
In action for damages to automobile at crossing, see RAILROADS, 1.
Applicability of instructions to pleadings, see TRIAL, 5.
To recover price paid for land, see VENDOR AND PURCHASER, 1-3.
Failure to allege tender to reconvey, in action for money procured by fraud, see VENDOR AND PURCHASER, 3.

1. PLEADING—COMPLAINT—SEPARATE STATEMENT OF CAUSES. Under Ballinger's Code, § 4942, requiring several causes of action to be separately stated, a complaint may be struck out where it pleads as one cause of action, a wrongful eviction from a leasehold, damages by reason of a leaky roof, and injury from change of a street grade. *Hockersmith v. Sullivan*..... 244

2. PLEADING—COMPLAINT—ELECTION—WRONGFUL DEATH — PROXIMATE AND CONCURRENT CAUSES. In an action for the wrongful death of a coal miner, the complaint states but a single cause of action, and it is error to require an election, where it is alleged, as proximate causes of the death, (1) that overhead rock fell upon the decedent through defendant's failure to furnish proper timbers, which caused gases to collect, and (2) that, through want of a sufficient ventilating system in decedent's working place, the gases caused decedent to

PLEADING—CONTINUED.

fall to his death, since the two causes were concurrent. *Davies v. Rose-Marshall Coal Co*..... 560

3. PLEADING—DEMURRER—OBJECTIONS RAISED. On demurrer to the complaint for fraud in the sale to plaintiff of an undivided interest in certain land, it cannot be assumed that the undivided interests were uncertain or incapable of being made certain, where such fact was not pleaded. *Bell v. Jovita Heights Co*..... 7

4. PLEADING — AMENDMENT — DISCRETION. Refusing permission to amend an answer upon sustaining a demurrer thereto, is within the discretion of the trial court, which will not be disturbed except for abuse; and no abuse appears, where the proposed amended answer states no additional facts or defenses material to the action not already pleaded in the original answer. *State ex rel. Murphy v. Coleman*..... 15

POLICY:

Of insurance, see INSURANCE.

POWERS:

Of special administrators, see EXECUTORS AND ADMINISTRATORS, 2.

PRACTICE:

See APPEAL AND ERROR; CERTIORARI; COSTS; CRIMINAL LAW; CONTINUANCE; DAMAGES, 5, 6; EVIDENCE; JUDGMENT; MANDAMUS; NEW TRIAL; PLEADING; PROHIBITION; TRIAL.

Prosecution of actions in general, see ACTION.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 28-38.

PREMIUMS:

For insurance, see INSURANCE, 1, 2.

Interest recoverable on earned premiums on indemnity policy, see INTEREST, 1.

PREMISES:

Dangerous premises, see NEGLIGENCE, 1.

PRESENTMENT:

Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2-4.

PRESUMPTIONS:

Foreign statutes, see DEATH, 1.

As to election between inconsistent defenses, see ELECTION.

As to public necessity for condemnation, see EMINENT DOMAIN, 4.

On cancellation of insurance policy, see INSURANCE, 2.

PRICE:

Action for price of goods sold, see SALES, 6.

PRINCIPAL AND AGENT:

See BROKERS.
Capacity of agent to sue as trustee of express trust, see ACTION, 4.
Liability of drawer on forged indorsement on check delivered to agent, see BANKS AND BANKING.
Corporate officers and agents, see CORPORATIONS, 3-9.
Liability of manager of dairy for adulteration of milk, see FOOD, 1.
Insurance agents, see INSURANCE, 2.
Depositing tender with third person, see TENDER.

1. PRINCIPAL AND AGENT — RELATION — CONTRACT — CONSTRUCTION — PARTNERSHIP. An agreement between box manufacturers was intended to establish an agency for the handling of their manufactured products, and does not create a partnership between them, where it in terms created an agency which was placed in charge of a board of principals upon which each party had a single representative, and the board was empowered to appoint a general agent to act as the agent of the principals "severally and respectively" in making sales and collections, the expressed purpose being to limit the production and fix prices, it being expressly agreed that the agency was to be "several" with no power to bind the principals jointly or create any joint obligation. *National Lumber & Box Co. v. Grays Harbor Commercial Co.*..... 31

2. PRINCIPAL AND AGENT—WRONGFUL ACT OF AGENT — LIABILITY OF PRINCIPAL. Where a gang of laborers, boarding on a co-operative plan, contracted for and received provisions and supplies, the membership of the gang changing from time to time, and the membership at the time the gang broke up contributed *pro rata* a sufficient sum to pay for all the supplies, paying the money over to an agent for that purpose, the same amounted to a ratification of the indebtedness by the then members of the gang; and renders them liable therefor, upon the default of their agent, who wrongfully failed to pay over the money contributed. *Northern Pac. R. Co. v. Edmunds*..... 98

PRINCIPAL AND SURETY:

See GUARANTY.
Right to invoke defense of statute of frauds by surety guaranteeing void lease, see FRAUDS, STATUTE OF, 3.
Liability of sureties on contractor's bond, see MUNICIPAL CORPORATIONS, 7-9.

PRIORITIES:

Of mortgages, see MORTGAGES.

PRIVILEGE:

Charging adultery in complaint for divorce, see LIBEL AND SLANDER.

PROBABLE CAUSE:

For prosecution of offense, see MALICIOUS PROSECUTION.

PROCESS:

See ATTACHMENT; DIVORCE, 8.

1. PROCESS—SERVICE BY PUBLICATION — JUDGMENT IN REM — EXECUTION—PROPERTY SUBJECT—JUSTICE OF THE PEACE—JUDGMENT. Rem. & Bal. Code, § 1766, providing that in case personal service cannot be had in a justice court action, by reason of the absence of the defendant from the county in which the action is commenced, service may be had by publication of the summons, authorizes only a judgment *in rem* against the property attached, even if the defendant was a resident of the state; and where the attached property is not sufficient to satisfy the judgment, no other execution can issue against other property of the defendant as in the case of personal judgments. *Clifford v. Pateros Transfer Co.*..... 665

PROFITS:

Recovering lost profits on breach of contract, see CONTRACTS, 6.

PROHIBITION:

1. PROHIBITION—WHEN LIES—ADEQUATE REMEDY BY APPEAL—ORDERS FOR PERFECTING APPEAL — JURISDICTION. Prohibition will not lie to prevent the enforcement of an order requiring the defendant, who had employed a court stenographer, to return to the stenographer his notes of the trial so that he might extend the same for use in preparing a statement of facts on appeal; since the court had jurisdiction of the subject-matter and the parties, and prohibition does not lie to correct error where there is an adequate remedy by appeal. *State ex rel. Griffith v. Superior Court*..... 386

PROMISE:

To pay debt of another, see CONTRACTS, 3; FRAUDS, STATUTE OF, 1.
Oral promise of accommodation indorser to pay note, see INDEMNITY, 2-4.

PROMISSORY NOTES:

See BILLS AND NOTES.

PROOF:

Of marriage and dependency, see DEATH, 2.
Of death, see DEATH, 1.
Of loss insured against, see INSURANCE, 4-6.

PROPERTY:

See BAILMENT.
Mortgage of, see CHATTEL MORTGAGES.
Damages for injuries to, see DAMAGES, 5.
Dedication to public use, see DEDICATION.
Taking or damaging for public use, see EMINENT DOMAIN.
Estoppel to assert title to, see ESTOPPEL.
Parol evidence as to ownership of personal property, see EVIDENCE, 8.
Opinion evidence as to value of, see EVIDENCE, 10.
Subject to execution, see EXECUTION.
Agreement for commissions on sale of personalty, see FRAUDS, STATUTE OF, 2.
Subject to execution on substituted service of process, see PROCESS.
Taxation of, see TAXATION.

PROXIMATE CAUSE:

Of death, see DEATH, 3.
Of injury to servant, see MASTER AND SERVANT, 6, 22.
Of injury to pedestrian struck by automobile, see MUNICIPAL CORPORATIONS, 22.
Of street car colliding with wagon, see STREET RAILROADS, 8.

PUBLICATION:

Service of process in attachment proceeding, see ATTACHMENT.
Of matter tending to encourage disrespect for law, see CONSTITUTIONAL LAW.
Certainty of statute prohibiting publication of matter tending to encourage disrespect for law, see CRIMINAL LAW, 1.
Service of process, see PROCESS.

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS, 1-15.

PUBLIC LANDS:

Mineral lands, recovery of possession, see MINES AND MINERALS.

PUBLIC POLICY:

Contract for public improvement, see MUNICIPAL CORPORATIONS, 5.

PUBLIC PROPERTY:

Taxation of, see TAXATION, 1-3.

PUBLIC USE:

Dedication of property, see DEDICATION.
Taking property for public use, see EMINENT DOMAIN.
Opening road or street for, see HIGHWAYS.

PUNISHMENT:

See CRIMINAL LAW, 1, 2.

QUALIFICATIONS:

Expert witnesses, see EVIDENCE, 10.

QUESTION FOR JURY:

Waiver of special agreement to store goods, see BAILMENT.
In action by passenger for injuries sustained in elevator, see CARRIERS, 6, 7.
Notice of defect in appliance supplied under contract, see INDEMNITY, 5.
In action for injury to servant, see MASTER AND SERVANT, 7, 21-25.
Negligence of pedestrian struck by automobile, see MUNICIPAL CORPORATIONS, 21.
In action for damages to property through obstruction in city culvert, see MUNICIPAL CORPORATIONS, 25.
Negligence of physician in treating patient, see PHYSICIANS AND SURGEONS.
In action for injury to driver of team, struck by street car, see STREET RAILROADS, 1, 7, 8.

QUIETING TITLE:

Joinder of rights of action to quiet title and for partition, see PARTITION.

1. QUIETING TITLE—DEFENSES—RELIEF—STATUTORY ACTION. Under Rem. & Bal. Code, § 785, providing that a person having an interest in real estate and the right to possession may recover the same and may have judgment quieting title, a defendant cannot defend upon the ground that a quitclaim deed constituting an alleged cloud is invalid and in fact not a cloud because not recorded, where he claims title under such deed. *Crowley v. Byrne*..... 444

RAILROADS:

Appropriation of property, see EMINENT DOMAIN, 3, 5-7, 9.
As employers, see MASTER AND SERVANT, 6, 7, 11, 15, 21.
Erection of bridge across navigable water, see NAVIGABLE WATERS.
In city streets, see STREET RAILROADS.

1. RAILROADS—ACCIDENTS AT CROSSINGS—PLEADING AND PROOF—VARIANCE. It is an immaterial variance that the complaint alleged that the defendant's engineer saw plaintiff's automobile stalled on a crossing in time to have stopped the train, and the proof showed that had the engineer been keeping a proper lookout, he could have seen plaintiff's signals, as he ran down the track to give warning, in time to have stopped the train and avoided the collision. *Nicol v. Oregon-Washington R. & Nav. Co.*..... 409

RAILROADS—CONTINUED.

2. SAME—CONTRIBUTORY NEGLIGENCE. It is contributory negligence for a driver of an automobile, on a bright night with all the lights on his machine lighted, to drive off a 16-foot planking at a railroad crossing and stall his car near the cattle guards. *Nicol v. Oregon-Washington R. & Nav. Co.*..... 409

3. SAME — ACCIDENTS AT CROSSINGS — CONTRIBUTORY NEGLIGENCE — LAST CLEAR CHANCE—EVIDENCE—SUFFICIENCY. In an action for damages to an automobile, negligently stalled on a railroad crossing in a public highway, the railroad company is liable under the doctrine of the "last clear chance," and the engineer is guilty of negligence, where it appears that the night was clear and a man on the track could have been seen a distance of 1,200 feet, and the train stopped within 1,000 feet without an emergency stop, that the plaintiff ran down the track lighting matches and waving his hands, in the rays of the headlight, giving the engineer 1,500 feet in which to stop the train had he been keeping a proper lookout. *Nicol v. Oregon-Washington R. & Nav. Co.*..... 409

RATIFICATION:

Of acts of corporate officers, see CORPORATIONS, 8.
Of proceedings instituted by authorized attorney, see EMINENT DOMAIN, 13.
Acts of insurance agents in cancelling policies and returning premiums, see INSURANCE, 2.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

Removal of cloud, see QUIETING TITLE.

RECEIVERS:

Of corporations in general, see CORPORATIONS, 14, 16.

RECORDS:

On appeal, see APPEAL AND ERROR, 17-21.
Necessity of recording, see CHATTEL MORTGAGES.
Jurisdiction, pending appeal, to order return of stenographer's notes for use in preparing statement of facts, see DIVORCE, 2.
As evidence, see EVIDENCE, 1-4.
Recording mortgage, see MORTGAGES.

REDEMPTION:

By minor heir, see TAXATION, 5-7.

REDUCTION:

Of capital stock, see CORPORATIONS, 2.
Remand of case for reduction of sentence, see CRIMINAL LAW, 13.

RELATION:

Application of doctrine, see COVENANTS, 1.
Of title as of date of option, on performance of same, see VENDOR AND PURCHASER, 7.

REMAND:

Of criminal case for proper sentence, see APPEAL AND ERROR, 13.
Of cause on appeal or writ of error, see APPEAL AND ERROR, 40-43; EMINENT DOMAIN, 15.

REMOVAL OF CAUSES:

Change of venue or place of trial, see VENUE.

RENT:

See LANDLORD AND TENANT, 1.

REPAIRS:

Assumption of obligation by tenant, see LANDLORD AND TENANT, 4.

REPEAL:

Implied repeal of law relating to vacation of streets, see MUNICIPAL CORPORATIONS, 16.
Implied repeal of act permitting minor to redeem from tax sale, see TAXATION, 5.

REPRESENTATION:

Of corporation by officers or agents, see CORPORATIONS, 7-9.

RESCISSION:

Of contract, see CONTRACTS, 4.
Presumption as to reliance on as defense in absence of election, see ELECTION.
Of contract of sale, see SALES, 1-4.
Of contract for sale of land, see VENDOR AND PURCHASER, 3.

RESERVATIONS:

In deeds, see DEEDS, 3.

RES IPSA LOQUITUR:

See MASTER AND SERVANT, 25.

RES JUDICATA:

See JUDGMENT, 4, 5.

RETURN:

Of premium on cancellation of policy by agent, see INSURANCE, 2.

REVENUE:

See TAXATION.

REVIEW:

See APPEAL AND ERROR; CERTIORARI.
Of orders, see COURTS, 2.
In criminal prosecution, see CRIMINAL LAW, 10-13.

REVIVAL:

Of action, see ABATEMENT AND REVIVAL.

REVOCATION:

Of submission to arbitration by court, see ARBITRATION AND AWARD.

RIPARIAN RIGHTS:

Damages for condemnation of, see EMINENT DOMAIN, 8.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 10, 11, 18, 19.
Assumption of risk by guest in using darkened stairway, see NEGLIGENCE, 1.

ROADS:

See HIGHWAYS.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 4-6, 9-11, 18.

SALARY:

Of corporate officer, see CORPORATIONS, 6.

SALES:

Of corporate stock, see CORPORATIONS, 3.
Damages for breach by seller, see DAMAGES, 1.
By personal representatives, see EXECUTORS AND ADMINISTRATORS, 5.
Fraud inducing sale of corporate stock, see FRAUD.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2.
Compliance with sales in bulk law, see FRAUDULENT CONVEYANCES.
Liability of partners on sale to firm, see PARTNERSHIP, 2.
Tax sales, see TAXATION, 5-7.
By trustee, see TRUSTS, 2.
Of realty, see VENDOR AND PURCHASER.

1. SALES—RESCISSION — FALSE REPRESENTATIONS. A sale of a cafeteria business will be rescinded for false representations to the effect that the business was being conducted at a profit, where it was the principal inducement leading to the sale and the purchaser had no means of ascertaining its truth. *Payne v. Lindsey Co.*..... 293

2. SALES—RESCISSION—RECOVERY OF DAMAGES—INCONSISTENT REMEDIES—ELECTION. The rescission of a sale, and the recovery of damages by way of recoupment, are inconsistent remedies, and cannot

SALES—CONTINUED.

be maintained concurrently, but the party should be required to make an election. *Thompson v. Rhodehamel*..... 24

3. SALES — RESCISSION — DILIGENCE. Where defendant purchased a lodging house of plaintiff, and gave notes and a chattel mortgage upon representations that plaintiff had a valid lease of the building and upon his contract to give a lease for two years, and subsequently the owner gave notice that the plaintiff had no lease, the defendant is not estopped from rescinding by delay until eviction four months later, where the plaintiff denied the owner's statement, and claimed at all times that he had a valid lease of the building, the facts being in doubt and disputed; since diligence is a relative question, and defendant had a right to rely on plaintiff's assurance. *Thompson v. Rhodehamel*..... 24

4. SALES—RESCISSION—RESTORATION OF STATUS. A rescission of a sale of a cafeteria business will not be denied for the reason that the purchaser discontinued the business and cannot restore it in the same condition as when received, where it was tendered back in substantially the same condition and inability to make full restitution was not the fault of the purchaser. *Payne v. Lindsey Co.* 293

5. SALES—WARRANTY — CONSTRUCTION—WORDS USED IN TECHNICAL SENSE—EVIDENCE—ADMISSIBILITY. Upon a sale of bottled grape juice to one experienced in the bottling business, under a guaranty to protect against any fermentation, evidence is admissible that such a guaranty was generally construed in the trade as a warranty that the juice would not ferment while in the sealed bottles nor for a reasonable time thereafter; both parties knowing that the juice would ferment within a short time after the bottles were opened. *Turlock Fruit-Juice Co. v. Pacific & Puget Sound Bottling Co.*... 128

6. SALES—ACTION FOR PRICE—PAYMENT—EVIDENCE—SUFFICIENCY. In an action for a balance due from two partners for electrical equipment to be used in four city contracts, upon the allegation that the partnership had extended to all the contracts, one of the partners cannot escape liability by asserting that the balance was due on the first contract in which he was not interested, where it appears that he fully paid up the first contract, before anything was due on the other three; even if the seller afterwards agreed with him that the payments so made might be applied on the other three contracts provided he in writing guaranteed payment of the balance, which was done. *Larkin v. Pederson*..... 116

7. SALES — BREACH OF SELLER — DEFENSES. A seller of pedigreed stock, who agreed to furnish certificates of registration, cannot escape libility for breach of the agreement by asserting that he was only a broker. *Yamaoka v. Kloeber*..... 598

8. SALES — BREACH BY SELLER — DAMAGES — MEASURE. Where pedigreed breeding stock was sold for export to Japan on the representa-

SALES—CONTINUED.

tion that it was registered and under an agreement to deliver registration certificates, with full knowledge of the market conditions in Japan, where the expense of marketing them was great and without the certificates the stock was valuable only as beef, the measure of damages is the difference between the value of the stock in Japan as contracted for and the value without the certificates; and damages in a large sum based upon reasonably certain evidence will be upheld as reasonably within the contemplation of the parties. *Yamaoka v. Kloeber*..... 598

SCHOOLS AND SCHOOL DISTRICTS:

Franchise ordinance fixing half rate fare for school children, see CARRIERS, 1, 2.

SENTENCE:

In criminal prosecutions, see CRIMINAL LAW, 9, 13.

SEPARATION:

Of jury in felony case, see CRIMINAL LAW, 7, 8.

SERVICE:

Of notice of laborer's lien, see MECHANICS' LIENS, 3.
Of process, see PROCESS.

SET-OFF AND COUNTERCLAIM:

Counterclaim as affecting amount in controversy, see APPEAL AND ERROR, 3.
Offset of damages to purchaser by broker's violation of instructions, see BROKERS, 4.

SHIPPING:

Assault on passenger by employee on ship, see CARRIERS, 3, 4.

SIGNALS:

Used in directing work, see MASTER AND SERVANT, 9.

SIGNATURES:

New signatures to note as material alteration, see ALTERATION OF INSTRUMENTS, 2, 3.

SLANDER:

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE:

Deposit of tender with third person, see TENDER.

SPEED:

Excessive speed in operation of street car, see STREET RAILROADS, 1.

STAIRWAYS:

Injury from use of darkened stairway, see NEGLIGENCE, 1.

STARE DECISIS:

See COURTS, 1.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 18-20; DIVORCE, 2.

Verified statement of creditors of vendor, see FRAUDULENT CONVEYANCES.

Separate statement of causes of action, see PLEADING, 1.

STATES:

Power to tax, see TAXATION, 1-3.

STATUTES:

Survival of action for death, see ABATEMENT AND REVIVAL.
Violating constitutional guaranties, see CONSTITUTIONAL LAW.
Criminal statutes, see CRIMINAL LAW, 1, 2.
Foreign statutes, presumptions, see DEATH, 1.
Actions for wrongful death, see DEATH, 4.
Pure milk law, see FOOD, 2.
Statute of frauds, see FRAUDS, STATUTE OF.
Of limitation, see LIMITATION OF ACTIONS.
Vacation of city streets, see MUNICIPAL CORPORATIONS, 16, 17.
Redemption by minor heir from tax sale, see TAXATION, 5.
Change of venue, see VENUE, 1.

1. STATUTES—TITLES AND SUBJECTS—SCOPE. An act entitled an act for the "government of municipal corporations" is broad enough to include provisions creating a police court and conferring jurisdiction thereon of prosecutions for petit larceny committed within the city. *State ex rel. Fugita v. Milroy*..... 592

2. STATUTES—CONSTRUCTION—PARTIAL VALIDITY—EFFECT. A statute will be upheld so far as it is legal, if the illegal part can be separated from the legal. *Gantenbein v. Pasco*..... 635

STENOGRAPHERS:

Power of lower court pending appeal to order return of stenographer's notes for use of plaintiff in perfecting record, see DIVORCE, 2.

STICKERS:

Voting by at special election, see ELECTIONS.

STOCK:

Corporate stock, see CORPORATIONS, 1-4.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 3, 4, 14-16.

STREET RAILROADS:

Carriage of passengers, see CARRIERS, 1, 2, 5, 9.
Use of street by as defeating abandonment by nonuser see HIGHWAYS, 1, 2.

1. STREET RAILROADS—INJURY TO PERSONS ON TRACK—NEGLIGENCE—EXCESSIVE SPEED—QUESTION FOR JURY. In an action by the driver of a team, struck by a street car, the negligence of the defendant is a question for the jury, where there was evidence that the car was exceeding the speed limit when the motorman first discovered the team on the track 300 feet away, and that the speed was not reduced until within two car lengths of the wagon; exceeding the lawful speed limit being negligence *per se*. *O'Brien v. Washington Water Power Co.*..... 688

2. STREET RAILWAYS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A pedestrian, struck by a cable car, is guilty of contributory negligence, as a matter of law, where it appears that he started diagonally across a street, paying no attention to a street car, which was in plain view and making considerable noise, nor to warning shouts; and he is not exonerated by the fact that he was slightly deaf, and from the country, and not used to street cars. *Slipper v. Seattle Elec. Co.*..... 279

3. SAME—NEGLIGENCE—LAST CLEAR CHANCE—EVIDENCE—SUFFICIENCY. The evidence of a gripman that he could have stopped a cable car within five or six feet and in time to avoid an accident to a negligent pedestrian, if the brakes had not been defective, does not warrant a finding that the defendant had the "last clear chance" to avoid the accident, where it appears from other evidence that the car, a heavy cable car thirty feet long, going down grade at a rate of 14 feet per second, was stopped within 15 or 20 feet, an emergency stop required the movement of two levers taking two or three seconds, and there was expert evidence that it could not have been stopped inside of from 30 to 60 feet, and the car had been operated all day and nothing found to be the matter with the brakes, since a "good stop" was shown; especially since a quicker stop might have endangered the passengers. *Slipper v. Seattle Elec. Co.*..... 279

4. STREET RAILWAYS—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE OF PEDESTRIANS—EVIDENCE — SUFFICIENCY. The contributory negligence of a pedestrian, struck by a street car, precludes any recovery, as a matter of law, notwithstanding negligence on the part of the company in excessive speed, where it appears that he approached a street car crossing where a car was unloading passengers, with an unobstructed view of the far track where he could

STREET RAILROADS—CONTINUED.

have seen an approaching car, that he did not look in that direction until near the standing car, which then obstructed his view, and walked rapidly behind the standing car without stopping to look, and was struck by the side or front end of a car passing on the other track. *Steuding v. Seattle Elec. Co.*..... 476

5. STREET RAILWAYS—INJURY TO PERSONS ON TRACK — CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION OF LAW. A pedestrian, standing so close to a track while waiting for a street car, that she was struck by a car coming from the opposite direction, is guilty of contributory negligence, as a matter of law, where it appears that the street was being graded, that she knew the company was using but one track where the work was not completed, that she was told that her car was waiting at a switch for another to come down, and that the night was dark and the street unlighted, and with no traffic or noise on the street, she paid no heed to the approaching car. *Armstrong v. Spokane & Inland R. Co.*..... 624

6. SAME—CONTRIBUTORY NEGLIGENCE—ORDINANCES—LAW OF ROAD. An ordinance requiring all vehicles to keep as near to the right-hand curb as possible was not intended to prohibit the driver of a wagon from driving upon a street car track in the center of the street, and it is not contributory negligence *per se* to do so. *O'Brien v. Washington Water Power Co.*..... 688

7. SAME — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. Where plaintiff testified that he was unable to drive off a street car track in time to avoid a collision, owing to a passing automobile and the skidding of his wheels on the rails, and there was evidence that he was intoxicated and inattentive, his contributory negligence was a question for the jury. *O'Brien v. Washington Water Power Co.*... 688

8. SAME—PROXIMATE CAUSE—QUESTION FOR JURY. Whether the negligence of the defendant or the contributory negligence of the plaintiff was the proximate cause of the accident, is a question for the jury, where a street car collided with a wagon, on the track, through the contributory negligence of the driver in failing to see the approaching car in time to get off the track, and the motorman saw the plaintiff's wagon on the track 300 feet away, and slowed down and might have applied the emergency brake in time to have avoided the collision. *O'Brien v. Washington Water Power Co.*..... 688

9. STREET RAILWAYS—INJURIES TO PERSONS ON TRACK—ACTIONS—INSTRUCTIONS. In an action for injuries sustained in a collision between a vehicle and a street car, an instruction that it was the duty of the motorman, when it became apparent to him that the plaintiff was about to cross the track, to use every care within his power to avoid a collision, is not prejudicially erroneous, where by other instructions the defendant was held to the rule of reasonable care. *Peterson v. Seattle Elec. Co.*..... 349

STREET RAILROADS—CONTINUED.

10. SAME. In such a case, it is not error to refuse to instruct that the defendant was not required to give a warning of the car's approach, where there was evidence that the car was going at a rate of speed which increased the hazards. *Peterson v. Seattle Elec. Co.* 349

STREETS:

See HIGHWAYS; MUNICIPAL CORPORATIONS, 16-21.
Dedication by plat, see DEDICATION.
Operation of railroad in streets as damage to abutting property, see EMINENT DOMAIN, 3, 5-7, 9.

STRUCTURES:

In navigable waters of state, see NAVIGABLE WATERS.

SUBLETTING:

See LANDLORD AND TENANT, 1.

SUBMISSION:

By court to arbitration, see ARBITRATION AND AWARD.

SUBSCRIPTIONS:

To corporate stock, see CORPORATIONS, 1, 16.

SUMMONS:

In county tax foreclosure, see TAXATION, 4.

SUPERSEDEAS:

On appeal, see APPEAL AND ERROR, 15, 16.

SUPPORT:

Alimony for support of child, see DIVORCE, 8.

SURFACE WATERS:

Damage to property by through defective condition of culvert, see MUNICIPAL CORPORATIONS, 23-25.

TAXATION:

Of costs, see COSTS, 4.
Payment of taxes by joint owner as notice to purchasers, see VENDOR AND PURCHASER, 8.

1. TAXATION—PUBLIC PROPERTY — ACQUISITION BEFORE LEVY. Under principles of public policy and Const., art. 7, § 2, and Rem. & Bal. Code, § 9098, exempting state property from taxation, lands purchased by the state in the months of May and August, cannot be subjected to the taxes levied for that year, in view of the fact that the levy of the tax cannot be made until October; since the development of liability for taxes was arrested the moment public ownership attached. *State v. Snohomish County* 320

TAXATION—CONTINUED.

2. TAXATION—LIEN ON LAND—RELATION—NECESSITY OF LEVY. Rem. & Bal. Code, § 9235, making the lien for taxes on real estate commence by relation on March 1 of the year in which they were levied, creates only an incipient or inchoate lien to become complete only on the making of a valid levy. *State v. Snohomish County*..... 320

3. TAXATION—LIEN—ACQUISITION OF LAND BY STATE. A tax certificate upon land purchased by the state constitutes a mere cloud and not a lien, in view of the fact that there is no statutory authority for enforcing the lien against the state. *State v. Snohomish County* 320

4. TAXATION—FORECLOSURE BY COUNTY—SUMMONS—NAME OF OWNER. In a general tax foreclosure prosecuted by the county, the summons is sufficient if the property is properly described, notwithstanding a mistake in the name of the owner. *Patterson v. Toler*..... 535

5. TAXATION—REDEMPTION BY MINOR HEIR—TENDER OF TAXES—STATUTES—IMPLIED REPEAL. Repeals by implication not being favored, Rem. & Bal. Code, § 9259, which is a special act permitting a minor to redeem his real property from tax sale, at any time after sale and before the expiration of one year after removal of his disability, was not repealed by the general act of 1907, p. 398, Rem. & Bal. Code, § 162, providing a limitation for the bringing of actions to set aside tax deeds or for the recovery of land sold for taxes. *Seattle Land & Improvement Co. v. Blum*..... 530

6. TAXATION—REDEMPTION BY MINOR—TENDER. A tender of taxes by a minor, pursuant to Rem. & Bal. Code, § 9259, providing for redemption from tax sales by minors, *ipso facto* operates as a redemption, the right being highly favored, requiring a liberal construction. *Seattle Land & Improvement Co. v. Blum*..... 530

7. TAXATION—REDEMPTION—PERSONS ENTITLED — GRANTEE OF MINOR. The right of a minor to redeem his land sold for taxes, within one year after attaining majority, given by Rem. & Bal. Code, § 9259, is assignable, and may be exercised by his grantee; especially where he warranted the title. *Seattle Land & Improvement Co. v. Blum*. 530

8. TAXATION—DEED—ACTION TO SET ASIDE—CONDITIONS PRECEDENT—TENDER OF TAX. A tender of taxes as a condition precedent to an action to set aside a tax deed is excused where it appears that the defendants claimed title to the land and plainly indicated that any tender would be refused. *Blinn v. Grindle*..... 120

TENANCY IN COMMON:

1. TENANCY IN COMMON—ESTOPPEL. One cotenant cannot estop another by his unauthorized words and acts. *Rowe v. James*..... 267

2. SAME. The fact that two cotenants circulated a petition for the vacation of a street with the knowledge and consent of another cotenant did not authorize them to surrender any of his rights in the property. *Rowe v. James*..... 267

TENDER:

As affecting right to interest, see INTEREST, 2.
Of taxes by minor, see TAXATION, 5, 6.
Of tax as condition precedent to action to set aside deed, see TAXATION, 8.
Of reconveyance on rescission of sale of land, see VENDOR AND PURCHASER, 3.

1. TENDER—DEPOSIT WITHOUT AUTHORITY. Where plaintiff in an action for specific performance did not tender the full amount due to defendants, but deposited the same with a third party without authority from the defendants, such person is plaintiff's agent, and judgment for the deposit is properly given against the plaintiff, in case the agent fails to pay over the money. *Kleeb v. McInturff*.. 419

TERMS:

Of leases, see LANDLORD AND TENANT, 2.

TIDE LANDS:

Damage to lessee of by erection of bridge, see NAVIGABLE WATERS.

TIME:

For serving notice of laborer's lien, see MECHANICS' LIENS, 3.
Application for change of venue, see VENUE.

TITLE:

To street dedicated by plat, see DEDICATION.
To fee of street on vacation, estoppel to assert, see ESTOPPEL.
Parol evidence as to ownership of personal property, see EVIDENCE, 8.
To vacated street, see MUNICIPAL CORPORATIONS, 17-19.
Removal of cloud, see QUIETING TITLE.
Statutes, see STATUTES, 1.
Passing of on performance of option to purchase, see VENDOR AND PURCHASER, 7.

TORTS:

See FRAUD; LIBEL AND SLANDER; MALICIOUS PROSECUTION; NEGLIGENCE; TRESPASS.
Condition precedent to action for, see ACTION, 1.
Action in contract or tort, joinder of, see ACTION, 2.
Measure of damages, see DAMAGES, 2-4.
Causing death, see DEATH.
Of employers, see MASTER AND SERVANT.
Agents, see PRINCIPAL AND AGENT, 2.

TRANSCRIPTS:

Of record for purpose of review, see APPEAL AND ERROR, 17-21.

TRESPASS:

1. TRESPASS—COMMON INCLOSURE—THROWING OPEN WITHOUT CONSENT—LIABILITY FOR TRESPASSING STOCK. Where a railroad acquired a right of way through inclosed lands, and took down the fences across its right of way, which it failed to fence up, thereby allowing stock to enter and trespass upon the lands formerly inclosed, it is liable for the damages, on the principle that an owner having an inclosure common with another cannot throw the close open without the other's consent; since no man shall use his own property in such manner as to injure that of another. *Hubert v. Connell Northern R. Co.*..... 567

TRIAL:

See NEW TRIAL.

Exceptions or objections for purpose of review, see APPEAL AND ERROR, 7-13, 21.

Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 17-20.

Review of verdicts, see APPEAL AND ERROR, 25.

Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 28-38.

Instructions in action for injuries through fall down elevator shaft, see CARRIERS, 8.

Continuance of, see CONTINUANCE.

Of criminal prosecution, see CRIMINAL LAW.

Summoning and impaneling jury, see JURY.

Right to trial by jury, see JURY.

Findings inconsistent with general verdict, see MASTER AND SERVANT, 3.

Instructions in actions for injury to servants, see MASTER AND SERVANT, 4.

Instructions in action for damages to property by construction of bridge across navigable water, see NAVIGABLE WATERS, 6.

Instructing as to defense of contributory negligence, see NEGLIGENCE, 2.

Instructions in action for injury sustained in collision between street car and vehicle, see STREET RAILROADS, 9, 10.

Place of trial, see VENUE.

Impeachment of witness, see WITNESSES.

1. TRIAL—RIGHT TO OPEN AND CLOSE—DAMAGES—EVIDENCE—BURDEN OF PROOF. Where the only issue on a counterclaim was the defendants' measure of damages in the sale of a horse, to be determined by the difference between the price paid and its actual value, the burden of proof is upon the defendants, with the right to open and close. *Kleeb v. McInturff*..... 419

2. TRIAL—EVIDENCE—OBJECTION—PRIMA FACIE PROOF. In an action upon an account assigned by a corporation, an assignment to plaintiff purporting to have been executed by the assistant treasurer of

TRIAL—CONTINUED.

the corporation, is admissible as against the objection "that it did not tend to establish any of the allegations of the complaint." *Pacific Drug Co. v. Hamilton*..... 469

3. TRIAL—MISCONDUCT OF COUNSEL. It is not misconduct of counsel, warranting a new trial in a personal injury case, to ask plaintiff if two children present were her children. *Keough v. Seattle Elec. Co.*..... 466

4. TRIAL—INSTRUCTIONS—WEIGHT AND SUFFICIENCY OF EVIDENCE. Instructions basing the right of recovery entirely on belief in the plaintiff's version of a disputed fact are proper where there was direct conflict on an essential matter and no middle ground on which a verdict could be predicated. *Wheeler v. Hotel Stevens Co.*..... 142

5. TRIAL—INSTRUCTIONS—EVIDENCE — PLEADINGS AND ISSUES. In an action for malpractice, instructions on the theory that the defendants treated plaintiff as specialists, are proper where the undisputed evidence showed that to be the case, notwithstanding the complaint alleged the cause of action against them as general practitioners. *Williams v. Wurdemann*..... 390

6. TRIAL—ISSUES AND PROOF—INSTRUCTIONS. Upon an issue as to whether defendant had notice of work going on in a cut near the street line under a city permit, the jury may take into consideration the fact that a permit had been issued for such work, where there was evidence that the defendant had seen the permit, and had inspected the work, and urged its completion; since the permit was one item in the line of circumstances tending to show notice. *Gasof v. Standard Ice Co.*..... 537

7. TRIAL—WRITTEN INSTRUCTIONS—NECESSITY. When the parties stipulated that instructions might be partly oral and partly in writing, they may be so given. *Wheeler v. Hotel Stevens Co.*..... 142

8. TRIAL—INSTRUCTIONS—ORAL INSTRUCTIONS. Under Rem. & Bal. Code, § 339, requiring that instructions to the jury be given in writing, it is reversible error to give oral instructions over the objection of the appellant. *State v. Burnam*..... 199

9. TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS. Instructions directing the jury to find the facts according to their conscientious belief are not misleading as addressed to their consciences rather than their minds. *Wheeler v. Hotel Stevens Co.*..... 142

10. TRIAL — CAUTIONARY INSTRUCTIONS — SYMPATHY AND PREJUDICE. Where there is a seeming necessity, the jury may be cautioned not to allow sympathy or prejudice to influence the verdict. *Wheeler v. Hotel Stevens Co.*..... 142

11. TRIAL—EVIDENCE—AFFIDAVITS. After a trial and oral decision it is error to retry the cause upon affidavits without an opportunity to meet the same. *Schultz v. Schultz*..... 327

TRIAL—CONTINUED.

12. TRIAL—FINDINGS—NECESSITY. Findings are not necessary to sustain a judgment of dismissal. *Lamar v. Anderson*..... 314

TRUSTS:

Capacity of trustee to sue in own name, see ACTION, 4.

1. TRUSTS—TESTAMENTARY TRUSTS—MANAGEMENT OF ESTATE—ABUSE OF DISCRETION—LIABILITY OF TRUSTEES—EVIDENCE—SUFFICIENCY. Testamentary trustees are shown to have exercised proper judgment in the execution of their trust, and should not be discharged or held to account for increased interest to certain objecting legatees, where it appears that they were expressly directed not to sacrifice the estate, and to hold and sell a particular business block as one property, that the deceased left but $64,000 cash on hand, while repairs and improvements on the business block were under way which would cost $85,000, besides which there was a charge to pay legacies amounting to over $367,000, $220,000 of which with annuities aggregating $3,840 a year, besides taxes, etc., that to meet this severe problem they incorporated the estate, the residuary legatees accepting stock in lieu of legacies, which earned less than four per cent, that to insure participation by the class of legatees objecting, they executed the several notes of the company for the sums due them, which drew interest at four per cent per annum, payable monthly; and such per cent is found to be a fair return, when men of financial judgment testified to that effect, considering the circumstances; especially where, for a time at least, payment of such interest was a mere gratuity; and such objecting legatees had no right to have their share of the estate invested in the stock of the company. *Trethewey v. Horton*..... 402

2. SAME—DISCRETION—SALE—OBLIGATION OF TRUSTEES. In such case, the testamentary trustees did not abuse their discretion in failing to convert into money real estate, the free use, possession, and enjoyment of which was devised to the wife for life, although she had moved away from the property; since the right to make such use of the proceeds during life is doubtful, and this precludes any abuse of discretion. *Trethewey v. Horton*..... 402

UTTERING:

Forged instruments, see FORGERY.

VACATION:

See JUDGMENT, 3.

Award, see ARBITRATION AND AWARD.

Jurisdiction to entertain second motion to vacate judgment, see COURTS, 2.

Of highways, see HIGHWAYS, 3.

Of streets, see MUNICIPAL CORPORATIONS, 16-20.

VALUE:

Limits of jurisdiction, see APPEAL AND ERROR, 1-3.
Opinion evidence as to value of property, see EVIDENCE, 10.

VARIANCE:

In action for damages to automobile at crossing, see RAILROADS, 1.

VENDOR AND PURCHASER:

Assignment of vendor's rights under option contract, see ASSIGNMENTS, 1.
Assignment of cause of action for fraud in sale of land, see ASSIGNMENTS, 2, 3.
Sale of property by agent, see BROKERS, 1, 2.
Sale by executor, see EXECUTORS AND ADMINISTRATORS, 5.
Transfer of ownership of personal property, see SALES.

1. VENDOR AND PURCHASER—RECOVERY OF MONEY PAID—FALSE REPRESENTATIONS—COMPLAINT—SUFFICIENCY. A complaint states a cause of action for the recovery of money procured by fraud, where it alleges that the defendant induced the plaintiff to purchase land, situated at a distance, in reliance upon false representations to the effect that the lots were on a level street, graded and with sidewalks, with adequate light and water facilities and electric railway service. *Bell v. Jovita Heights Co*..... 7

2. SAME—PLEADING—RELIANCE ON REPRESENTATIONS. A complaint for the recovery of money procured by fraudulent representations as to lots sold to the plaintiff sufficiently alleges that the representations were made prior to the execution of the contract, where it is alleged that the plaintiff relied upon the representations and made the contract. *Bell v. Jovita Heights Co*..... 7

3. VENDOR AND PURCHASER—RESCISSION BY PURCHASER—TENDER OF RECONVEYANCE—PLEADING—NECESSITY. In an action by a purchaser to recover money paid on sales induced by fraudulent representations, the complaint is not objectionable in that it fails to allege a tender to reconvey the land, where it does not appear from the complaint that the plaintiff ever received any deed. *Bell v. Jovita Heights Co*..... 7

4. VENDOR AND PURCHASER—CONTRACTS—WARRANTY—COVENANTS RUNNING WITH LAND. A contract to convey land by warranty deed does not require a deed direct from the vendor to the purchaser, but is satisfied if the vendor passed title by warranty to a third person, who conveyed by warranty to the purchaser; since the covenants run with the land and may be enforced against all the covenantors. *Big Bend Land Co. v. Hutchings*..... 345

5. SAME—ASSIGNEE OF VENDOR—LIABILITY. An assignee of a vendor under contract to convey and warrant to the extent of the recited consideration, is bound by the covenant, where he had notice of the rights of the vendee. *Big Bend Land Co. v. Hutchings*..... 345

VENDOR AND PURCHASER—CONTINUED.

6. SAME—ACTION FOR INSTALLMENT—DEFENSES. In an action on an installment due on a land contract, the vendee cannot defend on the assumption that the plaintiff will not, on the last payment, offer the deed called for by the contract. *Big Bend Land Co. v. Hutchings* 345

7. VENDOR AND PURCHASER — OPTIONS — PERFORMANCE — WHEN TITLE PASSES—RELATION. Where an option to purchase land has been exercised by payment of the price, the title relates back to the date of the option, as against parties having notice thereof. *Crowley v. Byrne* 444

8. VENDOR AND PURCHASER—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE—PAYMENT OF TAXES BY JOINT OWNER. Payment of taxes by a grantee in a deed which was ambiguous as to whether it conveyed a half or the whole interest, is not a circumstance pointing to a construction of the deed of which a subsequent *bona fide* purchaser need take notice; especially in view of the fact that payment of taxes by a joint owner is no evidence of claim of title. *Golden v. Pilchuck Tribe No. 42, Improved Order of Red Men*.. 581

VENIRE:

Summoning jury from "body of city," see JURY.

VENUE:

Mandamus to compel change, see MANDAMUS, 1.

1. VENUE—CHANGE—BIAS OF JUDGE—SCOPE OF ACT. Laws 1911, p. 617, authorizing a change of venue on account of the bias of the judge applies to a proceeding to modify a decree of divorce respecting the custody of a child. *Bedolfe v. Bedolfe*..... 60

2. VENUE — CHANGE—BIAS OF JUDGE—TIME. An application for change of venue on account of the bias of the judge, made in a proceeding to modify a decree of divorce respecting the custody of a child, is in time if made at the first appearance of the respondent in such proceeding. *Bedolfe v. Bedolfe*..... 60

VERDICT:

Review on appeal, see APPEAL AND ERROR, 25.
Inadequate or excessive damages, see DAMAGES, 2-4.

VICE PRINCIPALS:

See MASTER AND SERVANT, 15.

VIEW:

In condemnation proceeding, see EMINENT DOMAIN, 14.

VISITATION:

Right of parent to visit child, see DIVORCE, 7.

VOTERS:

See ELECTIONS.

WAIVER:

See APPEAL AND ERROR, 22; ESTOPPEL.
Of agreement to store goods, see BAILMENT.
By defendant of written instructions, see CRIMINAL LAW, 6.
Of objections to separation of jury in felony case, see CRIMINAL LAW, 8.
Right to appointment as executor, see EXECUTORS AND ADMINISTRATORS, 1.
Presentment of claim against estate, see EXECUTORS AND ADMINISTRATORS, 3, 4.
Notice and proof of loss insured against, see INSURANCE, 4-6.

WAREHOUSEMEN:

See BAILMENT.

WARNING:

To servant of dangers, see MASTER AND SERVANT, 9, 10.

WARRANTY:

Covenants of, see COVENANTS.
On sale of goods, see SALES, 5.
Conveyance by warranty deed, see VENDOR AND PURCHASER, 4, 5.

WATERS AND WATER COURSES:

See NAVIGABLE WATERS.
Improvements for development of water power, see MINES AND MINERALS.
Contract for public water supply, see MUNICIPAL CORPORATIONS, 1-5.
Damage to property from defective culvert, see MUNICIPAL CORPORATIONS, 23-25.

WIDOWS:

Consent to suit by executor for wrongful death, see DEATH, 5-8.

WILLS:

Construction and execution of trusts, see TRUSTS.

WITNESSES:

Absence of, ground for continuance, see CONTINUANCE, 2.
Cross-examination of accused, see CRIMINAL LAW, 5.
Experts, see EVIDENCE, 10.

1. WITNESSES—CROSS-EXAMINATION—CRIMINAL LAW—EVIDENCE OF OTHER ACTS—ADMISSIBILITY. In a prosecution for forgery, where accused had sworn in his own behalf and detailed a state of facts favorable to himself, stating that he relied on the statements of one H. and that his desk had been rifled and papers taken away, it is proper on cross-examination, as testing his credit and impeaching his testimony, to ask if he and H. had not been engaged in passing off other spurious papers on the public, and if his confederates had not rifled his desk in order to do away with the papers. *State v. Peeples* 451

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.
Bonds to secure laborers and materialmen, see MUNICIPAL CORPORATIONS, 6-9.
Claims of laborers on public work, see MUNICIPAL CORPORATIONS, 14.

WRITINGS:

Waiver of written instructions, see CRIMINAL LAW, 6.
Parol evidence to vary or explain, see EVIDENCE, 5-7, 9.
Forgery of, see FORGERY.
Written instructions to jury, see TRIAL, 7.

WRITS:

See ATTACHMENT; CERTIORARI; EXECUTION; MANDAMUS; PROCESS; PROHIBITION.

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